

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NAVIENT SOLUTIONS, LLC,	.	Civil Action No. 1:19cv461
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	August 13, 2021
THE LAW OFFICES OF JEFFREY	.	11:03 a.m.
LOHMAN, et al.,	.	
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

VOLUME V

APPEARANCES:

FOR THE PLAINTIFF:	GEORGE R. CALHOUN, ESQ. JEFFREY R. HAMLIN, ESQ. Ifrah PLLC 1717 Pennsylvania Avenue, N.W. Suite 650 Washington, D.C. 20006 and LISA M. SIMONETTI, ESQ. Greenberg Traurig LLP 1840 Century Park East Suite 1900 Los Angeles, CA 90067
FOR THE LOHMAN DEFENDANTS:	JEFFREY E. GRELL, ESQ. Grell Feist PLC 825 Nicollet Mall, Suite 625 Minneapolis, MN 55402

(APPEARANCES CONT'D. ON FOLLOWING PAGE)

(Pages 1033 - 1238)

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 FOR THE LOHMAN DEFENDANTS: THOMAS F. URBAN, II, ESQ.
3 Fletcher, Heald & Hildreth, PLC
4 1300 N. 17th Street, Suite 1100
Arlington, VA 22209

5 FOR DEFENDANTS GST MIKHAEL D. CHARNOFF, ESQ.
6 FACTORING, INC.; Perry Charnoff PLLC
7 GREGORY TRIMARCHE; AND 1010 N. Glebe Road, Suite 310
RICK GRAFF: Arlington, VA 22201

8 ALSO PRESENT: JEFFREY LOHMAN, ESQ.
9 TROY STANDISH
ROBERT TANENBAUM, ESQ.

10 OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR
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I N D E X

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
<u>WITNESSES ON BEHALF OF THE PLAINTIFF:</u>					
Wayne Travell	1045	1064	1069		1047 1048
Andrew Reinhart (Recalled)	1074	1080			
Philip J. Harvey	1135	1145 1152	1156		1136 1137

WITNESS ON BEHALF OF
LOHMAN DEFENDANTS:

Jeffrey Edward Lohman (Recalled)	1085	1109	1117
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EXHIBITS

	<u>MARKED</u>	<u>RECEIVED</u>
<u>PLAINTIFF'S:</u>		
No. 911		1136
915 to 922		1084
926 to 930		1084
936 to 945		1084
947 to 948		1084
950		1084
952		1084
954		1084
956 to 959		1084
961 to 963		1084
965		1084

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EXHIBITS (Cont'd.)

MARKED

RECEIVED

PLAINTIFF'S:

No. 967 to 979	1084
982 to 987	1084
989 to 997	1084
1002	1112

LOHMAN DEFENDANTS':

No. 2033	1103
2076	1087
2078	1090
2082	1089
2222	1098

1 P R O C E E D I N G S

2 (Jury out.)

3 THE CLERK: Civil Action 19-461, Navient Solutions,
4 LLC, versus the Law Offices of Jeffrey Lohman, et al. Would
5 counsel please note their appearances for the record.

6 MR. CALHOUN: Good morning. George Calhoun and Jeff
7 Hamlin with Ifrah PLLC and Lisa Simonetti of Greenberg Traurig
8 for the plaintiff.

9 THE COURT: Good morning.

10 MR. GRELL: Jeff Grell and Tom Urban for the Lohman
11 defendants.

12 THE COURT: Good morning, Mr. Grell.

13 MR. CHARNOFF: Good morning, Your Honor. Mike
14 Charnoff on behalf of GST Factoring, Inc.; Greg Trimarche; and
15 Rick Graff.

16 THE COURT: All right. All right, you wanted to talk
17 to me before we get started?

18 MR. CALHOUN: We have a couple of issues, Your Honor.

19 THE COURT: All right.

20 MR. CALHOUN: We worked overnight to try to reduce
21 the stipulation and made a lot of progress. I don't think we
22 came to a final agreement, but what we propose is to hand up a
23 dramatically pared down stipulation and propose that you read
24 that.

25 THE COURT: Well, all right. I mean, is the one that

1 you've handing up something to which the defendants have
2 agreed, or is this --

3 MR. CALHOUN: It's not totally clear.

4 MR. URBAN: No, Your Honor.

5 THE COURT: All right. Rather than take up the
6 jury's time, except that -- are any of the facts to which there
7 is not yet an agreement facts that you feel put you at a
8 disadvantage because you did not work to produce evidence to
9 support them during the trial because you were relying on the
10 stipulation coming in?

11 MR. CALHOUN: Some of them are, Your Honor.

12 THE COURT: I'm sorry?

13 MR. CALHOUN: Some of them are, Your Honor. We
14 can -- I mean, it's not long, and given your prior ruling, if
15 you think it makes sense, it's essentially a condensed version
16 of the admissions that you already recognized.

17 THE COURT: All right. Well, right now we want to
18 get Mr. Travell's testimony in.

19 MR. CALHOUN: Yes.

20 THE COURT: I mean, he's here. There are timing
21 issues.

22 Or is it Mr. Harvey? I see he's here.

23 MR. CALHOUN: He's rebuttal, Your Honor. I expect it
24 all to go today.

25 THE COURT: All right. You know, no one ever asked

1 for a rule on witnesses, so we've been very lax about that, and
2 I think it's too late at this point to impose it, but I just
3 for the record want you to know that it could have been
4 requested, but it was not.

5 MR. CALHOUN: Correct, Your Honor.

6 THE COURT: All right.

7 MR. CALHOUN: We do have one other issue.

8 THE COURT: All right, so I'm passing on the
9 stipulations. That's a matter we'll do outside the presence of
10 the jury, obviously, and I don't want to hold them up. They're
11 all here.

12 Yes, Ms. Simonetti.

13 MS. SIMONETTI: We have one further issue, Your
14 Honor, with the invoices that we talked about briefly with
15 Mr. Reinhart. If you remember, we admitted the chart that's
16 Exhibit 910, but we did not move the invoices themselves into
17 evidence, and in part, this was because there was the proposal
18 to hear the directed verdict motion which was coupled with a
19 waiver, as we understood it, to at least to some extent, of a
20 challenge to the reasonableness of the fees, but now apparently
21 that's not the case.

22 So we would need to put Mr. Reinhart on very briefly
23 to discuss the invoices because they object to them.

24 THE COURT: In other words, there's an objection from
25 defense counsel to the underlying data upon which the summary

1 chart was produced?

2 MS. SIMONETTI: Just the invoices, yes.

3 THE COURT: The invoices for attorneys' fees from
4 what, Hinshaw?

5 MS. SIMONETTI: Correct.

6 THE COURT: What's the basis for the objection?

7 MR. URBAN: My understanding is they're not actually
8 the invoices. They're something that Navient created from the
9 invoices, but they're not the actual invoices from Mr. Lueck.

10 Our client -- the other problem is they didn't
11 introduce them when they had their witness on. You know, I
12 just don't see -- I mean, they referred to them. They had
13 every opportunity to introduce them, and they didn't.

14 So I just have a lot of problems with these invoices
15 because they're summaries created by Navient. They are not the
16 actual invoices.

17 THE COURT: All right. I'm going to allow -- because
18 we did do things a little unusually yesterday in terms of, you
19 know, jumping in with the motions for directed verdict towards
20 the end of their case. I'm going to let them reopen that
21 testimony.

22 MS. SIMONETTI: Thank you, Your Honor.

23 THE COURT: And you can cross-examine all you want
24 about it, all right?

25 MS. SIMONETTI: Thank you, Your Honor.

1 THE COURT: All right. So let's have the -- are we
2 ready for the jury? Wait, is there a defense issue?

3 MR. URBAN: Oh, two other things, Your Honor.

4 THE COURT: Yeah.

5 MR. URBAN: The first thing is, how are you going to
6 address Mr. Branch being dismissed?

7 THE COURT: I thought you might ask that question. I
8 have multiple ways of doing it. I can do it now or do it at
9 the end.

10 MR. URBAN: We would like you to do it now.

11 THE COURT: All right. I'm just going to say, you
12 know, you may recall yesterday afternoon I let you go home
13 early because we've been streamlining the case. It's been
14 streamlined. We've been able to remove one defendant from the
15 case; that's all. Draw no inferences one way or the other from
16 the fact that Mr. Branch is no longer part of this case.

17 MR. URBAN: And the second thing is, Your Honor --

18 THE COURT: Anybody have an objection to basically
19 that being said to the jury?

20 MR. CALHOUN: Your Honor, we think that's fine.

21 MR. CHARNOFF: No objection from GST.

22 THE COURT: All right.

23 MR. URBAN: No objection from us.

24 The second thing is Mr. Travell will be the first
25 witness. We ask that Navient not be allowed to lead him.

1 There's no established that he's an adverse witness. As a
2 matter of fact, quite the contrary, I think Mr. Travell is a
3 straight shooter who will give honest answers to all the
4 questions he's asked, and I don't believe it's appropriate.

5 I also notice that if Ms. Simonetti is questioning,
6 she tends to lead every third question.

7 THE COURT: Well, both sides have been leading, and I
8 don't like leading questions to begin with, and from talking
9 with jurors, they don't like it either because it really does
10 suggest that the attorney is trying to plant the answer.

11 I mean, I know why we all do it as lawyers, but
12 nonetheless, I think that's not -- that's it. That's an
13 appropriate request.

14 Mr. Travell is known to the Court, as is Mr. Harvey.
15 I would not expect either of these witnesses to do anything but
16 to tell things as straight as they can, all right?

17 MR. URBAN: So I may have some leeway to object if --

18 THE COURT: Try to keep the objections to a minimum,
19 but I'll warn counsel who are calling a witness to make sure
20 you don't lead. It should not be necessary. All right?

21 MR. URBAN: Thank you, Your Honor.

22 THE COURT: All right. Let's have the jury come in.

23 THE COURT SECURITY OFFICER: Yes, Your Honor.

24 THE COURT: Oh, sorry. Was there something?

25 MR. CHARNOFF: Yes. Just very quickly, Your Honor,

1 with respect to Mr. Travell. Two other items: One, I think
2 the Lohman defendants raised in motions in limine and then
3 again the other day, obviously, any questions would have to be
4 limited to the four corners of the expert designation for
5 Mr. Travell. So I'm just reminding the Court of that issue.

6 Second, I just want to be sure that we're going to
7 have a very brief opportunity to voir dire qualifications
8 before we get to any substantive testimony.

9 THE COURT: The qualifications for Mr. Travell?

10 MR. CHARNOFF: Correct.

11 THE COURT: He was your witness.

12 MR. URBAN: No, he wasn't theirs.

13 MR. CHARNOFF: He wasn't my witness.

14 THE COURT: Oh, all right.

15 MR. CHARNOFF: And I'm going to be quite candid with
16 the Court. He's only licensed in three jurisdictions, and I
17 just want to establish that he's not licensed to testify about
18 the reasonableness of attorneys' fees in 47 states where he's
19 not licensed. So I need to -- I want to do that at the
20 beginning, when we're discussing qualifications.

21 THE COURT: All right, I'll permit it.

22 MR. CHARNOFF: Thank you, Your Honor.

23 THE COURT: We don't -- we tend to not spend a lot of
24 time in this court on expert qualifications. You move the CV
25 in, and that's it.

1 MR. CHARNOFF: I understand, Your Honor, but it's a
2 scope issue.

3 THE COURT: All right. Okay.

4 MR. URBAN: Would you like a copy of his report?
5 It's the four corners of his designation.

6 THE COURT: All right, let's bring the jury in.

7 THE COURT SECURITY OFFICER: Yes, Judge.

8 MR. CALHOUN: Your Honor, we don't mind giving it to
9 the Court, but just to be clear, we're not moving it into
10 evidence.

11 THE COURT: What, this?

12 MR. CALHOUN: Yes.

13 THE COURT: No.

14 (Jury present.)

15 THE COURT: Once again, good morning, ladies and
16 gentlemen. Again, you've all been here on time. We really
17 appreciate that.

18 And I want you to know that we actually made a great
19 deal of progress yesterday afternoon while you were away. We
20 have been able to streamline the case.

21 I want you to know that there is now one fewer
22 defendant. Mr. Branch is no longer involved in this case.
23 You're to draw no inference one way or the other as to the fact
24 that he's no longer a defendant in the case.

25 We have also streamlined a fair amount of the

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1 evidence. I'm reasonably optimistic, I think we are going to
2 get close to finishing the evidence today, possibly a little
3 bit Monday, but we've been able to shorten this trial.

4 All right, we're going to begin now with a recall of
5 one of the plaintiff's witnesses, correct?

6 MR. CALHOUN: We're going to do Mr. Travell first,
7 Your Honor.

8 THE COURT: Oh, you're going to do Mr. Travell first?
9 All right. So, Mr. Travell, if you'll come up?

10 WAYNE TRAVELL, PLAINTIFF'S WITNESS, AFFIRMED

11 DIRECT EXAMINATION

12 BY MR. CALHOUN:

13 Q. Good morning, Mr. Travell. Can you state your name for
14 the record, please.

15 A. My name is Wayne Travell.

16 Q. And, Mr. Travell, you're an attorney?

17 A. I am.

18 Q. All right. And have you been hired to provide expert
19 testimony in this case?

20 A. I am.

21 Q. All right. And what were you hired to provide expert
22 testimony concerning?

23 A. I was hired to express an opinion about the reasonableness
24 of attorneys' fees as an element of damages in this case.

25 Q. All right. Can you tell the Court your background in this

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1 field?

2 A. I was -- I've been an attorney since 1982. That's not
3 quite 40 years but almost. I'm admitted to practice in the
4 Commonwealth of Virginia 1982, as a member of this court at
5 about the same time. I'm also admitted to the practice of law
6 in Maryland and in the District of Columbia and have been
7 members of the Maryland -- I've been a member of the Maryland
8 Bar since 1983 and the Virginia Bar -- the D.C. Bar since 1984.

9 Q. All right. And have you done any professional writing on
10 the subject of attorney fee reasonableness?

11 A. No. I did participate in the presentation of a CLE,
12 continuing legal education course, recently in this court, the
13 Federal Bar Association that's associated with this court. The
14 materials were written by Craig Reilly, who's another lawyer in
15 this court -- courthouse.

16 Q. And have you been named before as an expert witness with
17 regard to the reasonableness of attorneys' fees?

18 A. I have.

19 Q. All right. And in what courts have you been recognized as
20 an expert in that area?

21 A. In this court, in a case called *Salim v. Dahlberg*. I
22 believe that was in 2016. And in the Western District of
23 Virginia, the federal court in Harrisonburg, in Roanoke, I
24 believe. One case was called *Stultz v. The Department of Motor*
25 *Vehicles*, and the other case was *Doe v. Alger*.

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1 In addition to that, I've been named and qualified as
2 an expert in the Circuit Court for Fairfax County as an expert
3 witness. There may be others, but those are the ones that come
4 to mind.

5 MR. CALHOUN: Your Honor, we would submit that
6 Mr. Travell is qualified to testify as an expert.

7 THE COURT: All right, I think there wants to be a
8 little bit of voir dire.

9 MR. CHARNOFF: Very briefly, Your Honor.

10 THE COURT: Mr. Charnoff?

11 VOIR DIRE EXAMINATION

12 BY MR. CHARNOFF:

13 Q. Good morning, Mr. Travell.

14 A. Good morning.

15 Q. I just want to articulate something with respect to your
16 background. Is it correct that you are not licensed and have
17 never been licensed to practice law in the 48 states other than
18 Virginia and Maryland and then, obviously, the District of
19 Columbia?

20 A. That's correct.

21 MR. CHARNOFF: I have no further questions, Your
22 Honor.

23 THE COURT: Was there any voir dire from the Lohman
24 defendants? Mr. Urban?

25 MR. URBAN: No, Your Honor.

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1 THE COURT: No? All right, you may proceed.

2 MR. URBAN: Actually, one question, Your Honor.

3 THE COURT: Yes.

4 VOIR EXAMINATION

5 BY MR. URBAN:

6 Q. Mr. Travell, who were you hired by in this case to opine
7 on the reasonableness of attorneys' fees?

8 A. By defendant the Law Offices of Jeffrey Lohman and two
9 other individuals in addition to Mr. Lohman himself.

10 MR. URBAN: Thank you, Your Honor. That's all.

11 END OF VOIR DIRE EXAMINATION

12 DIRECT EXAMINATION (Cont'd.)

13 BY MR. CALHOUN:

14 Q. Mr. Travell, what is the rate that you're charging in
15 connection with your work in this case?

16 A. \$595 an hour.

17 Q. Okay. And as part of your work, did you review the
18 electronic attorney billing records provided through the
19 discovery by the plaintiff, Navient?

20 A. Yes. What I reviewed, I believe, were computer summaries
21 that were a software program that was maintained by your
22 client, Navient. I never was provided with actual copies of
23 invoices that were submitted by law firms to the client,
24 Navient.

25 Q. All right. And through your review of those invoices, did

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1 you identify a principal attorney who worked on behalf of
2 Navient?

3 A. I believe so.

4 Q. And who was that?

5 A. George Lueck, I think. I'm not sure how you pronounce his
6 last name. It's --

7 Q. Dennis Lueck?

8 A. Dennis Lueck? Okay.

9 Q. Okay. And what was the hourly rate charged by Mr. Lueck?

10 A. I believe it was \$305 an hour.

11 Q. And if Mr. Lueck were billing time in the Eastern District
12 of Virginia, do you have an opinion as to whether that rate
13 would be a reasonable rate for Mr. Lueck in the Eastern
14 District of Virginia?

15 MR. CHARNOFF: Your Honor, I'm going to object to the
16 foundation. There's no foundation for any work done in the
17 Eastern District of Virginia.

18 THE COURT: No, it's a hypothetical question. It's
19 not inappropriate, but you need more of a foundation than that.

20 MR. CALHOUN: Okay.

21 THE COURT: The hourly rates are connected to other
22 factors.

23 MR. CALHOUN: All right.

24 Q. And in your work, did you observe how many years Mr. Lueck
25 had been in practice?

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1 A. I wasn't asked to opine about whether or not his rate was
2 reasonable in Virginia. There was no evidence that I saw in
3 the record as to any evidence of what the reasonable rates
4 would have been in the communities in which his services were
5 performed. As I understand the applicable standard --

6 THE COURT: Wait. I'm sorry, Mr. Travell, just
7 answer the specific question, all right?

8 THE WITNESS: All right. Can you tell me what the
9 question was again?

10 BY MR. CALHOUN:

11 Q. I asked if you had looked at how long Mr. Lueck had
12 practiced.

13 A. I don't recall how long he'd been practicing.

14 Q. And do you recall that he was with any particular law
15 firms?

16 A. Pardon me?

17 Q. Do you recall which law firms he practiced at in the
18 invoices you reviewed?

19 A. I think in the early cases, it was with Akerman
20 Senterfitt, which is a national law firm out of, based in
21 Florida; and then later, he was in, like, Denver, someplace in
22 the Mountain States; and then he was with a firm out of
23 Chicago, Hinshaw, in their New York and San Francisco offices.

24 Q. Okay. And was Mr. Lueck a partner?

25 A. I believe so. I'm not certain, but I believe so.

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1 Q. All right. I'm going to go back to my prior question.
2 Based on your understanding of Mr. Lueck and his practice from
3 your review of the invoices, if the services had been rendered
4 by Mr. Lueck in this district, do you agree that his rate would
5 be reasonable?

6 THE COURT: Wait.

7 MR. URBAN: I object, Your Honor. That's outside the
8 scope of his designation. Nowhere in his designation does it
9 talk about the reasonableness of the attorneys' fees on an
10 hourly basis.

11 MR. CHARNOFF: I join in the objection on behalf of
12 GST.

13 THE COURT: If it's not -- if it's not within the
14 four corners of the report, it's not proper. I'll sustain the
15 objection.

16 BY MR. CALHOUN:

17 Q. All right. Part of your work, did you review -- with
18 respect to the electronic attorney billing records that you
19 reviewed, you expressed an opinion that you couldn't determine
20 the reasonableness of some redacted invoices; is that right?

21 A. I did.

22 MR. CHARNOFF: Objection. Leading.

23 THE COURT: All right. You're not supposed to lead,
24 remember? Sustained.

25 BY MR. CALHOUN:

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1 Q. With respect to the invoices that you reviewed, did you
2 make any determinations as -- could you make any determinations
3 as to the reasonableness of any of those time entries?

4 MR. CHARNOFF: Objection. Foundation. We've not
5 established any work was done in any --

6 THE COURT: Yeah, it should be to the materials that
7 were evaluated.

8 MR. CALHOUN: That's what I asked him about.

9 THE COURT: You used the word -- you used the word
10 "invoice." That's become an issue in the case.

11 BY MR. CALHOUN:

12 Q. The materials you evaluated, were you able to draw an
13 opinion as to any of the time entries that you reviewed?

14 MR. CHARNOFF: Objection. Foundation. There's no
15 foundation as to entries in the limited jurisdictions this
16 witness is licensed to practice law.

17 THE COURT: Can you go just more directly to his
18 various opinions that are in the report?

19 BY MR. CALHOUN:

20 Q. All right. Mr. Travell, did you express any opinions
21 about redacted invoices?

22 A. I did.

23 Q. All right. And what was the opinion you expressed as to
24 redacted invoices?

25 A. My opinion is that if the redactions of time entries, and

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1 what that means that to the extent that a lawyer enters time
2 for a particular task, the lawyer will then add a description
3 of what he or she has done for the client. So, for example,
4 for today's entry, it would be on August 13 of 2012 (sic), you
5 express the amount of time as -- the amount of actual time
6 elapsed on a particular topic.

7 So if an entry said 0.3, typically the points are
8 six-minute increments, so that would be 18 minutes. 0.3, and
9 then there's a description that might say something to the
10 effect of studied case law regarding reasonableness of
11 attorneys' fees in the Fourth Circuit.

12 Oftentimes, lawyers will redact, meaning edit out,
13 certain elements of the description so that the actual -- the
14 actual task that was being performed by the lawyer is not
15 visible to the opposing counsel. So in looking at
16 reasonableness of attorneys' fees, one has to determine whether
17 or not the entry adequately describes what the work was done.

18 So if there's a redaction that eliminates from the
19 reviewer's perspective what actually happened, I've expressed
20 an opinion at least with regard to some of the entries that I
21 saw, I was not able to determine the reasonableness of whether
22 the task was necessary for that particular, that particular
23 client, for that particular matter.

24 Q. Mr. Travell, who gets to decide whether a time entry is
25 reasonable?

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1 A. I was asked to make the determination as to whether it was
2 reasonable.

3 Q. You were asked to give an opinion on that?

4 A. I was.

5 Q. All right. And was it your opinion that the fact finder
6 gets to make that decision?

7 MR. URBAN: Objection, Your Honor.

8 THE COURT: I'm going to sustain the objection. But
9 I'll tell the jury right now we normally don't let witnesses
10 testify as to their opinion about a fact in the case. We make
11 an exception for people who are deemed to be experts, and an
12 expert is basically somebody who by experience or specialized
13 training developed some expertise in an area in which the
14 average juror would have no true knowledge about.

15 You should evaluate the testimony of an expert
16 witness the way you evaluate any other witness. It's --
17 ultimately, you-all as the finders of fact make the factual
18 determination, but you are permitted to accept an expert's
19 opinion if you're satisfied that it's based on a good
20 foundation, or you can reject it, or you can accept part of it
21 and reject part of it. It's ultimately up to you.

22 But Mr. Travell will be permitted to give an opinion
23 about the reasonableness of the attorneys' fees, but you need
24 to make sure you've laid a proper foundation.

25 BY MR. CALHOUN:

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1 Q. Mr. Travell, can you look at Exhibit 924, please?

2 A. Is that my expert witness report?

3 Q. It's not your report.

4 THE COURT: Plaintiff's Exhibit 924. What volume is
5 that?

6 MR. CALHOUN: Your Honor, I'm sorry, that is Exhibit
7 16 -- Binder 16.

8 THE COURT: Binder 16.

9 THE WITNESS: Okay.

10 THE COURT: Is that in evidence yet?

11 MR. CALHOUN: No, Your Honor. That will be the
12 subject of the next witness.

13 THE COURT: So you're not moving it in?

14 MR. CALHOUN: I will, Your Honor, but --

15 THE COURT: I'm sorry, are you moving it in with this
16 witness or somebody else?

17 MR. CALHOUN: We're going to move it in with the next
18 witness, but I'm going to move this one in just so the jury can
19 see what I'm talking about.

20 Q. Mr. Travell, is this --

21 THE COURT: Hold on. Is there going to be an
22 objection to 924?

23 MR. URBAN: With this witness, yes, Your Honor.

24 THE COURT: All right. It's going to be hard for the
25 jury, I think, to understand what he's talking about without

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1 their ability to see it.

2 MR. CALHOUN: I have a very, very short question.

3 THE COURT: All right. Let me hear the question, all
4 right.

5 BY MR. CALHOUN:

6 Q. Can you look at page 18, please, Mr. Travell?

7 A. 18?

8 Q. It will be -- it will bear a label 924.0018.

9 THE COURT: Lower right-hand corner. It's a Bates
10 stamp.

11 THE WITNESS: Yes, I see it.

12 BY MR. CALHOUN:

13 Q. All right. Do you see a redaction on this page?

14 A. I do.

15 Q. Okay. And this is a time entry that reads "Teleconference
16 with Navient regarding benefits of remaining in federal court,
17 nature of discovery to conduct, and other issues with," and
18 then there's a redaction. That's how it reads.

19 A. Yes.

20 Q. All right. And is it your opinion that one cannot
21 determine the reasonableness of this time entry due to this
22 redaction?

23 A. Yes.

24 Q. All right. And if the period -- if there had been a
25 period that stopped after "issues" -- and how much time was

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1 billed on that task?

2 A. I believe it's .2 hours, which would be 12 minutes.

3 Q. All right. And if there was a period after "issues,"
4 would you have any dispute that that time entry would have been
5 reasonable?

6 MR. CHARNOFF: Your Honor, I'm going to object to the
7 hypothetical.

8 THE COURT: Overruled.

9 MR. URBAN: Well, Your Honor, I'm going to object to
10 it because Mr. --

11 THE COURT: The question he's -- what counsel is
12 trying to get at is whether or not the redaction makes a
13 material difference. It's a fair question. I've overruled the
14 objection. Go ahead.

15 THE WITNESS: It, it might, and the reason I hesitate
16 is because one of the issues is whether or not the time is
17 properly recorded to this matter for this client, and to the
18 extent that the redacted part shows that this is an improper
19 entry, I would -- in my opinion, you're not able to determine
20 whether it's reasonable or not.

21 BY MR. CALHOUN:

22 Q. Did you --

23 A. But the question is, you know, if there was a period after
24 "issues," would that come to my attention? Probably not. We
25 looked at thousands of lines of entries. I probably wouldn't

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1 have been drawn to it if there had not been a redaction.

2 Q. Let, let me clarify it so we can maybe take of that
3 concern. If what you assumed, that the entry were properly
4 billed on this matter and that it was a period after "issues,"
5 would this strike you as something you could not determine the
6 reasonableness of?

7 A. It would not have come to my notice.

8 Q. And you mentioned that you reviewed thousands of lines of
9 text. You did not express an opinion as to improper block
10 billing -- did you express an opinion as to improper block
11 billing in this time entry?

12 MR. URBAN: Objection. Outside of the scope. I
13 mean, the question itself --

14 THE COURT: Well, the question was leading, and then
15 it got, it got improved. It was not a leading question.

16 MR. URBAN: But he doesn't talk about block billing
17 in the report, so it's outside of the scope of the report
18 itself.

19 MR. CALHOUN: It's not outside the scope of his work,
20 Your Honor, because he, he reviewed all of these entries and
21 came up with just the --

22 THE COURT: You can ask him what are the -- what are
23 the bases for which he determines that these are not sufficient
24 or that they're inadequate, but -- and I'll let the witness
25 explain his bases, all right? So one is there was redacting.

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1 MR. CALHOUN: I want to establish from him that he
2 didn't --

3 THE COURT: So don't lead, in other words.

4 MR. CALHOUN: I'm trying not to lead, but I'm trying
5 to establish, Your Honor, that -- as far as the time entries
6 themselves, in your review, did you find any other issues with
7 how these time entries were billed?

8 MR. URBAN: And I'm going to object for foundation.
9 Nowhere in the report does it say that he looked at the time
10 entries substantively, and it hasn't been established by
11 Mr. Calhoun that he looked at them substantively.

12 THE COURT: Well, ask the question, how did you go
13 about doing this report?

14 BY MR. CALHOUN:

15 Q. Well, Mr. Travell, you, you reviewed the -- as part of
16 your work, the electronic billing materials, you testified
17 earlier. Did you review the electronic billing materials in
18 connection with your work?

19 A. Yes.

20 Q. And did you review all of them to --

21 THE COURT: That's going to be leading.

22 MR. CALHOUN: It's going to be, so I was stopping,
23 Your Honor.

24 Q. Did you mark --

25 THE COURT: What did you do in your review? How did

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1 you conduct your review?

2 THE WITNESS: Well, again, I used the criteria that I
3 understand are applicable to a determination of reasonableness
4 fees -- reasonableness of fees in this circuit, which starts
5 with the lodestar analysis. I looked at --

6 THE COURT: Can you explain "lodestar"? The jury
7 won't know that.

8 THE WITNESS: I will, Your Honor, thank you.

9 What happens in an application for fees, the finder
10 of fact, in this case the jury, has to make a determination as
11 to whether the overall hours expended on a particular matter
12 were -- was reasonable given the tasks that were asked to be
13 done, and once one determines that the number of hours spent
14 were reasonable, then you multiply that times a reasonable
15 hourly rate for each of the lawyers or timekeepers that
16 recorded time to that matter.

17 Once that is done -- and that's a mathematical
18 process. Once you get a reasonable number of fees and a
19 reasonable hourly rate, you make that mathematical
20 determination, and then you apply about a dozen different
21 factors that are recognized in this circuit, Johnson/Barber
22 factors, and those are things such as whether or not the party
23 looking for fees was successful in the underlying action, what
24 was the degree of success, and there are other factors like
25 that.

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1 Not every factor applies in every case, and in this
2 particular case, I tried to focus on the factors that were
3 relevant here.

4 BY MR. CALHOUN:

5 Q. Mr. Travell, did you see evidence in your review of the
6 billing records that Navient had reviewed the invoices and made
7 any changes?

8 A. I saw notes from time to time that there appeared to be
9 comments. I wasn't sure who those people were, but yes, I did
10 see notes.

11 Q. All right. And did those comments involve reductions in
12 the amount of those invoices?

13 THE COURT: Wait.

14 MR. URBAN: Leading again, Your Honor.

15 THE COURT: What?

16 BY MR. CALHOUN:

17 Q. What did those comments involve?

18 A. I, frankly, don't recall specifically what they said, but
19 if -- they were generally in the nature of requests for
20 reductions in the amount of time entered.

21 Q. All right. And did the invoices demonstrate billing
22 discipline?

23 MR. CHARNOFF: Objection. Foundation. So the
24 foundation is did he actually review any else.

25 MR. CALHOUN: He said it three times.

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1 THE COURT: Wait.

2 MR. URBAN: He said he reviewed the substance. If
3 you look at his report, he talked about redacted entries, but
4 he never talked about any of the substance of the entries.

5 THE COURT: I'm not going to sit here and take the
6 jury's time to read a five- or six-page single-spaced report.
7 You-all need to stop objecting to every single question. On
8 cross-examination, you can probe whether the testimony is
9 adequate.

10 But, Mr. Travell, in your own words, would you just
11 go into some detail as to exactly how you went about doing the
12 evaluation, any problems you saw with the report -- or with
13 the, with the data that you were working with, and how you came
14 to your conclusion? All right?

15 THE WITNESS: Thank you, Your Honor.

16 In looking at these fees, again, the first thing I
17 noticed, that there was some redactions of the time entries. I
18 looked at those and made a determination as to whether or not I
19 thought I could express an opinion as to whether they were
20 reasonable given the, given the fact that there was some black
21 parts marked out, and determined I thought they were not.

22 Beyond that, I did not make any further determination
23 as to whether or not the time spent on a particular matter was
24 excessive or not.

25 BY MR. CALHOUN:

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1 Q. All right. Do you recall your deposition, Mr. Travell,
2 when we talked about -- I'm going to back up and ask another
3 question first.

4 So when you looked at the redactions, did you look at
5 every single invoice?

6 A. Yes. I looked at all the records that were provided to
7 me, which I believe were all of the records that supported the
8 claim for fees in this case.

9 Q. All right. And that was, that was the records provided to
10 you with respect to every single borrower that was listed in
11 Navient's damages?

12 MR. URBAN: Objection. Foundation. And moreover, at
13 the time of his report, there was other borrowers.

14 THE COURT: Has this report been adjusted because
15 things changed during the course of discovery?

16 MR. CALHOUN: It has not, Your Honor.

17 THE COURT: Well, that's problematic in itself.

18 BY MR. CALHOUN:

19 Q. Did you -- in reviewing these invoices for redactions,
20 regardless of what borrower it's with respect to, you
21 reviewed -- did you review all of them or just select ones?

22 A. I read every entry on every invoice.

23 Q. All right. And did you express any opinion as to those
24 entries other than the redactions as to the nature of those
25 entries?

Travell - Cross

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1 A. I don't believe so.

2 MR. CALHOUN: All right. Your Honor, no further
3 questions.

4 THE COURT: All right. Mr. Urban, I assume you're
5 going to cross?

6 MR. URBAN: I'll let Mr. Charnoff go first.

7 THE COURT: All right. Mr. Charnoff?

8 MR. CHARNOFF: Your Honor, at this time, I have no
9 cross.

10 THE COURT: All right. Mr. Urban?

11 CROSS-EXAMINATION

12 BY MR. URBAN:

13 Q. Good morning, Mr. Travell. How are you, sir?

14 A. Mr. Urban, good morning.

15 Q. You testified earlier that you were hired by the Lohman
16 defendants. Do you know why you were hired by the Lohman
17 defendants?

18 A. I was hired to express a fee -- I'm sorry, an opinion as
19 to the reasonableness of attorneys' fees in this case.

20 Q. Okay. And prior to today, have you ever met me face to
21 face in person?

22 A. No.

23 Q. Okay. Did plaintiff, Navient, timely designate an expert
24 on attorneys' fees in this case for their case-in-chief?

25 MR. CALHOUN: Objection, Your Honor.

Travell - Cross

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1 THE COURT: Sustained.

2 MR. URBAN: Well, it goes to whether he had an
3 ability to --

4 THE COURT: That's not -- but that's not a proper
5 question.

6 MR. URBAN: Okay.

7 Q. Did you have an opportunity to rebut any testimony of
8 Navient's regarding the reasonableness of attorneys' fees?

9 A. No. In the -- one of the opinions that I expressed in the
10 report is that I looked in the record for any evidence of
11 reasonableness of attorneys' fees, which I believe to be
12 plaintiff's burden in a case like this. There was no such
13 evidence. There was no evidence as to whether or not these
14 fees are reasonable.

15 I also understand that the reasonableness of fees has
16 to be proved as to every jurisdiction in which the services
17 were rendered. So to the extent that, you know, I practice law
18 in Virginia, Maryland, and D.C., I'm very familiar with hourly
19 rates and reasonableness standards in these jurisdictions.

20 I don't know what the standards are in Texas, I'm not
21 admitted to practice there, or in California, or in the dozens
22 of other jurisdictions in which these litigations actually took
23 place.

24 So because there was no evidence that I saw in the
25 record as to the reasonableness of the rates in those

Travell - Cross

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1 jurisdictions, there was nothing for me to opine about, and
2 frankly, I wouldn't have been competent to talk about
3 reasonableness of rates in jurisdictions other than in places
4 where I practice law.

5 Q. In your review of these cases, were any of the cases from
6 D.C., Maryland, or Virginia?

7 A. I don't believe so.

8 Q. Okay. Did you review the substance of the entries in the
9 Navient summaries of attorneys' fees?

10 A. No. I was looking more for things like the redactions,
11 obvious things that would have drawn my attention to things
12 that we are regular about. I didn't see any -- nothing like
13 that jumped out at me other than the, the redactions.

14 Q. So if an attorney spent 60 hours on a two-page brief, did
15 you review and opine on that information?

16 A. No.

17 Q. Now, if you could look at Navient Exhibit 924 that
18 Mr. Calhoun showed you earlier?

19 Sorry, I should have told you to keep that up there.

20 A. Okay.

21 Q. Did most of the redacted time entries involve just the
22 redaction of one word, or were these redactions usually more --
23 of more substantial portions of the time entries?

24 A. Well, again, it varies, and whether it's -- the redaction
25 is, you know, it's just essentially like a Magic Marker was

Travell - Cross

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1 used to blank out a portion of a line of description. So
2 whether there's one word -- one really long word or four kind
3 of short words, you know, I couldn't tell, but most of them
4 appeared to be more than a word or two.

5 Q. Okay. And if you look at page 25 of Exhibit 924, on
6 December 18, 2018, do you see an entry for Mr. Lueck that's
7 been redacted?

8 A. I do.

9 Q. Would you say that that redacted a significant portion of
10 whatever was done by Mr. Lueck?

11 A. Well, again, just looking at the entry, it covers
12 one-and-a-half, one-and-a-half lines. Half of the first line
13 and all of the second line is redacted. So it appears that,
14 you know, probably two-thirds of the entry there is unavailable
15 to look at to see what the -- description of what was being
16 done.

17 Q. If you could turn to page 28 on that same exhibit?

18 A. Yes, sir.

19 Q. Do you see an entry on December 24, 2018, by Mr. Lueck?

20 A. Yes.

21 Q. And what percentage generally do you believe was redacted
22 of that entry?

23 A. Similar to the entry we looked at, it's, you know, a line
24 and two-thirds or a line and a half, and what I can read is:
25 "Analyze known" -- and then several words appear to be blanked

Travell - Cross

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1 out -- "to determine whether," and then the rest of the entry
2 is blanked out.

3 So I know they're analyzing and determining, but I
4 don't know what's being analyzed or what's being determined.

5 Q. Okay. And how long was that entry total? You said
6 one-and-a-half lines were blocked out. How long was that entry
7 total?

8 A. It's three-tenths of an hour, which would be 18 minutes.

9 Q. Oh, no, no, no. The number of lines.

10 A. The number of lines in the description?

11 Q. Yeah.

12 A. It's about one and three-quarters, one and a half.

13 Q. Okay. So you'd say most of the entry is blocked out?

14 A. More than, more than half of it is, like two-thirds of
15 that particular line entry.

16 Q. Okay. Do you believe that those two time entries are
17 emblematic of the kinds of redactions you saw throughout the
18 various invoices?

19 A. Yes.

20 Q. And have you been presented sufficient evidence to opine
21 that the attorneys' fees paid by Navient were reasonable?

22 A. No.

23 Q. Are you testifying today that the attorneys' fees paid by
24 Navient are reasonable?

25 A. No, they're not in my opinion.

Travell - Redirect

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1 MR. URBAN: That's all the questions I have, Your
2 Honor --

3 THE COURT: All right. Redirect?

4 MR. URBAN: -- at this time.

5 REDIRECT EXAMINATION

6 BY MR. CALHOUN:

7 Q. Mr. Travell, just keeping you on Exhibit 924, on page 25,
8 the time entry you referenced there says "Analyze plaintiff's
9 responses to written discovery for," and then there's a blank
10 out. And how long was that time entry?

11 A. Mr. Calhoun, can you tell me what page again?

12 Q. Exhibit 924, page 25.

13 A. I'm sorry. And your question again is how much time
14 was --

15 Q. How long was that time entry?

16 A. It says 0.5, which is 30 minutes.

17 Q. So that would be half an hour?

18 A. Yes.

19 Q. If that entry had ended after discovery, would it be your
20 view that a half-an-hour review of discovery responses would be
21 unreasonable?

22 A. I, I can't tell based on this entry whether it's
23 reasonable or not.

24 Q. I'm asking you a hypothetical. If it just ended.

25 A. Yeah, I can't express an opinion on that.

Travell - Redirect

1070

1 Q. You don't have an opinion?

2 A. No.

3 Q. Have you ever reviewed written discovery responses for
4 half an hour?

5 MR. URBAN: Objection, Your Honor.

6 THE COURT: No, I'll sustain that -- I'll overrule
7 that, rather. I think he's an experienced lawyer. He can say
8 what he's done in his past.

9 THE WITNESS: Yes.

10 BY MR. CALHOUN:

11 Q. You have?

12 MR. URBAN: Well, my objection is in the overall
13 context of all the time sheets, that there's no foundation.

14 THE COURT: I'm going to allow -- I'm going to allow
15 this.

16 BY MR. CALHOUN:

17 Q. You have?

18 A. So I have reviewed discovery, written discovery certainly.

19 Q. And you've spent half an hour on that?

20 A. Maybe.

21 Q. Maybe more?

22 A. Maybe more, maybe less.

23 Q. All right. Mr. Urban asked you whether you reviewed this
24 and saw anything like 60 hours for a two-page memo or something
25 like that. Do you recall that testimony?

Travell - Redirect

1071

1 A. I recall the question.

2 Q. Okay. And did you see anything like that?

3 A. I really wasn't looking for that, and again, I was -- when
4 I looked at the record, I was looking for evidence of
5 reasonableness of the hourly rates in particular markets. I
6 saw none of that.

7 So when it came time to look at the invoices, what I
8 was looking at was not so much the substance of what was being
9 performed as whether there was anything in addition to the lack
10 of proof of reasonableness that jumped out at me. Things that
11 jumped out at me were the redactions to, to the records.

12 Q. All right. And, in fact, when you reviewed these
13 invoices, do you recall your deposition testimony when you
14 talked about the nature of the time entries?

15 MR. CHARNOFF: Objection to form. This is
16 referencing deposition testimony. There's been no testimony to
17 compare it to.

18 THE COURT: Well, I'm not sure about that. I need to
19 hear the question and see whether, whether there's any problem
20 here.

21 BY MR. CALHOUN:

22 Q. All right. So in your deposition, we talked a little bit
23 about the invoices and your review of them, and do you recall
24 testifying that the invoices involved a fair amount of
25 discipline?

Travell - Redirect

1072

1 MR. URBAN: Objection, Your Honor. If he hasn't
2 asked that question, you can't refresh recollection if you
3 haven't asked the question in the first place.

4 THE COURT: And this is also -- this is also
5 redirect, so I think that's a proper objection at this point.

6 MR. URBAN: Right.

7 MR. CALHOUN: Your Honor, just because the question
8 they asked went to questions like excessive time, but he
9 actually expressed an opinion on that in his deposition, which
10 I think I'm entitled to elicit.

11 THE COURT: If, in fact, he did, let's get the
12 deposition. Let me see what page you're looking at, all right?
13 Do you have a copy?

14 MR. URBAN: And again, it's not within the four
15 corners of the report.

16 THE COURT: But it may not be but you-all -- if he
17 was deposed, then everybody had a chance to develop it further.
18 You were not present at his deposition?

19 MR. URBAN: No, I was, but, Your Honor, you can ask
20 anything in a deposition well outside of the four corners of
21 the designation. Just because you ask something in a
22 deposition doesn't bring it within the four corners of the
23 designation.

24 THE COURT: Nobody ever is stuck literally within the
25 four corners of an expert report. Depositions are used to

Travell - Redirect

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1 further develop an understanding. I've overruled the
2 objection.

3 But let me see the page first of all.

4 MR. CALHOUN: 67, Your Honor, 18 to 25.

5 THE COURT: Hold on a second.

6 MR. CHARNOFF: Your Honor, just for the completeness
7 of the record, on behalf of GST, I'm also going to object to
8 attempting to impeach your own witness.

9 THE COURT: All right, let me take a look. I'm
10 sorry, page 67, what line?

11 MR. CALHOUN: 18 to 25, Your Honor.

12 THE COURT: I think out of context, this doesn't
13 help. I'm going to sustain the objection.

14 BY MR. CALHOUN:

15 Q. Mr. Travell, did you observe any block billing in the, in
16 the materials you reviewed?

17 THE COURT: That was already asked previously, and
18 there was an objection.

19 MR. CALHOUN: He's now established that he's reviewed
20 all of these time entries.

21 MR. URBAN: It's beyond the scope.

22 THE COURT: It was asked in direct. I sustained an
23 objection.

24 MR. CALHOUN: Okay. Thank you, Your Honor.

25 THE COURT: I assume there's no recross?

Reinhart - Direct

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1 MR. URBAN: No, Your Honor.

2 THE COURT: All right. Mr. Travell, thank you for
3 your testimony. You're excused at this time.

4 THE WITNESS: Thank you, Your Honor.

5 (Witness excused.)

6 MR. CHARNOFF: Your Honor, I just want to re-raise --

7 THE COURT: I'm sorry, were you going to use this
8 witness again?

9 MR. CHARNOFF: No.

10 THE COURT: Oh, all right. Okay.

11 MR. CHARNOFF: Your Honor, at this point, again, for
12 clarity of the record, I would move to strike 910 as without
13 foundation under 402 and 403.

14 THE COURT: All right. I'm not going to rule on that
15 at this time, all right?

16 All right. So we're going back now to which witness?

17 MS. SIMONETTI: Mr. Reinhart.

18 THE COURT: All right. Mr. Reinhart, you're going to
19 be back on the stand. You're still under your affirmation to
20 tell the truth.

21 ANDREW REINHART, PLAINTIFF'S WITNESS,

22 PREVIOUSLY AFFIRMED, RECALLED

23 DIRECT EXAMINATION

24 BY MS. SIMONETTI:

25 Q. Good morning, Mr. Reinhart.

Reinhart - Direct

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1 A. Good morning.

2 Q. I think it's still morning. Yep.

3 Can you remind us of your job responsibilities at
4 Navient?

5 A. Yes. Part of my job responsibilities, I work within the
6 legal department. We're tasked with reviewing legal complaints
7 and gathering documents, putting together, like, a fact-based
8 summary and opinion and providing that to in-house counsel.

9 Q. Okay. Can you look back at Exhibit 916? That's in
10 Volume 15.

11 A. You said Exhibit 916?

12 Q. 916.

13 THE COURT: I don't think 916 is in yet, or is it?

14 MR. URBAN: No, it is not.

15 THE COURT: No, all right.

16 MR. CHARNOFF: Absolutely not, Your Honor.

17 MS. SIMONETTI: It is. I have it right here.

18 MR. URBAN: It is not in evidence.

19 MS. SIMONETTI: Oh, no, it's not in evidence.

20 THE COURT: No.

21 MS. SIMONETTI: I'm sorry, it's not in evidence. I
22 misheard you.

23 Q. Do you have it?

24 A. Yes.

25 Q. Okay. What is this document?

Reinhart - Direct

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1 A. This is a copy or a PDF screenshot of an invoice within
2 Legal Tracker.

3 Q. And where did this document come from?

4 A. It came from Legal Tracker.

5 Q. Okay. And can you remind me what that system is?

6 A. Yes. It's a third-party web-based program that Navient
7 utilizes for billing purposes.

8 Q. Does Navient having billing guidelines for outside
9 counsel?

10 A. Yes, of course.

11 Q. Have you ever seen those?

12 A. Yes, I have.

13 Q. Can you describe them for us generally, what they contain?

14 A. Just general guidelines on how to enter time into --

15 MR. URBAN: Your Honor, I'm going to object to all
16 this because the problem is this witness has already testified.
17 I thought he was just here to introduce these.

18 THE COURT: Look, either -- I'm going to allow the
19 plaintiff to try to show the foundation for their damage claim.
20 It's not improper. I sort of did an unusual cutting of their
21 case yesterday to try to accommodate some scheduling issues.
22 I'm allowing this.

23 You can cross-examine about it, all right?

24 MR. URBAN: Very well.

25 THE COURT: The objection is overruled.

Reinhart - Direct

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1 MR. URBAN: Thank you.

2 BY MS. SIMONETTI:

3 Q. Mr. Reinhart, could you start over?

4 A. I'm sorry, could you ask the question again?

5 Q. Can you describe for us generally what the billing
6 guidelines provide?

7 A. Yes. Generally, they're guidelines about how to enter the
8 time into the system that we utilize. Things like, for
9 instance, when entering, you want, like, a description of what
10 the time is. You have to enter the attorney's name, the amount
11 of time billed. We generally want the invoices in every month.
12 I think I mentioned that earlier. But just general guidelines
13 like that.

14 Q. Okay. Let's look at Exhibit 916, and can you identify
15 some of the information that's reflected in there?

16 A. Yes. So in 916, this is again a copy of an invoice. We
17 can see, you know, the invoice information up top, who the firm
18 was, the vendor, in this case Hinshaw, and it just goes
19 through, we could see the office, the particular invoice number
20 that's assigned to every invoice, the billing period, the
21 amount approved.

22 And if we page forward to really the, you know, kind
23 of meat and potatoes of it, at the end, you can see a
24 line-by-line, like, line items of what the attorney did, what
25 the date was, who the timekeeper was, the units, the rate, and

Reinhart - Direct

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1 then the amount in the right-hand, the right-hand column.

2 Q. And can you explain how Legal Tracker is used to input
3 this information?

4 A. Of course. So again, it's a third-party, sorry,
5 third-party web-based program that all of our vendors use, all
6 of our firms that we utilize, not only Hinshaw, Akerman was
7 mentioned, but all of our firms. So it's uniform across the
8 board.

9 They log into the system. There's a specific format
10 that they're using. There's drop-down menus, and then
11 ultimately, like I said, you get down to the line item. They
12 free form and type out what they did, drop down for, you know,
13 the units and so forth, and then they submit it.

14 And electronically it comes to Navient. That shows
15 up into the inbox of whatever in-house counsel is assigned as
16 an action item. They then have to log into Legal Tracker,
17 click into the invoice, review it, make any adjustments that
18 they deem necessary, and then approve.

19 Q. Does Navient accept legal billing in any other manner?

20 A. We do not, no. We utilize this program because it makes
21 it easy to track.

22 Q. Once the invoices are approved, does Navient pay them?

23 A. Yes.

24 Q. What's the process for that?

25 A. So once they're submitted, the actual tool goes through --

Reinhart - Direct

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1 goes to our finance department. They actually wire the money
2 to the firms.

3 Q. Did Navient pay the invoices at issue in this case?

4 A. Of course, yeah. Otherwise, they wouldn't have
5 represented us any longer.

6 MS. SIMONETTI: Nothing further.

7 THE COURT: All right.

8 MR. URBAN: I do have some questions, Your Honor.

9 THE COURT: All right.

10 MS. SIMONETTI: I'm sorry, I --

11 THE COURT: Yes.

12 MS. SIMONETTI: Do you want me to move the exhibits
13 in after the, the further questioning, the list of exhibit
14 numbers?

15 THE COURT: It's your case. Decide what you want to
16 do.

17 MS. SIMONETTI: Okay. Well, I would ask to move the
18 exhibits into evidence.

19 THE COURT: Which exhibit is that? 916?

20 MS. SIMONETTI: No, it's a list. Are you ready?
21 These are all the same.

22 THE COURT: They're all the same?

23 MS. SIMONETTI: They're all in the same format, but
24 I'm going to give you the numbers.

25 THE COURT: Just give me the numbers.

Reinhart - Cross

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1 MS. SIMONETTI: Okay. 915 to 922, 926 to 930, 936 to
2 945 --

3 THE COURT: Wait. Hold on. Wait one second.

4 MS. SIMONETTI: Sure.

5 MR. URBAN: Could she go back two?

6 THE COURT: 915 to 922, 926 to 930.

7 MS. SIMONETTI: Correct.

8 THE COURT: 936 to 945 so far.

9 MS. SIMONETTI: So far. 947, 948, 950, 952, 954, 956
10 to 959, 961 to 963, 965, 967 to 979.

11 THE COURT: I'm sorry, 967 to 979?

12 MS. SIMONETTI: Correct. 982 to 987, 989 to 993, and
13 994 to 997. That's it.

14 THE COURT: I'm sorry, 994 to 997?

15 MS. SIMONETTI: Yes.

16 THE COURT: All right. Before I admit them, I'll let
17 you-all cross-examine.

18 MR. URBAN: Thank you, Your Honor.

19 THE COURT: Mr. Urban?

20 CROSS-EXAMINATION

21 BY MR. URBAN:

22 Q. Mr. Reinhart, good morning.

23 A. Good morning.

24 Q. Now, this is a document that once there's any entries put
25 into it by a law firm can be edited by Navient; is that

Reinhart - Cross

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1 correct?

2 A. The 916 that we were looking at?

3 Q. Yes.

4 A. There's no edits that can be made except for the line
5 items where we actually, say, if, like, an attorney deemed that
6 something was too many hours. They can actually go in and
7 reduce it and provide a reason for it.

8 Q. All right. But you said in your testimony that Navient
9 can make adjustments, correct?

10 A. To the amount of time we can reduce. So not for the
11 sections of the bills, but if we go to, like, the actual line
12 items, they can go line item by line item, and if they need to
13 reduce something or they feel that there was block billing,
14 which just basically means that an attorney grouped all their
15 activities together instead of listing them out one by one,
16 they can make those type of reductions.

17 Q. Okay. There's a lot of information on here that is not
18 put in by the law firm, correct?

19 A. Some of the information comes from, from Navient.

20 Q. Right. As a matter of fact, it says "Final Approver" --

21 THE COURT: Can you refer to a page?

22 MR. URBAN: It's the first page. I'm sorry, Your
23 Honor. It's maybe the middle of the page "Final Approver,
24 Patrick Chaing."

25 THE COURT: All right.

Reinhart - Cross

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1 THE WITNESS: Yes. So as I stated before, when we
2 receive these invoices, they go through an approval process, so
3 the approval -- or, I'm sorry, the invoice doesn't become final
4 until the final approver approved it.

5 BY MR. URBAN:

6 Q. Okay. And if you can reduce time, you can also increase
7 time, correct?

8 A. I don't see why we would.

9 Q. No, the question is can you? Is it possible?

10 A. I'm not sure because I've never seen that.

11 Q. Okay. Have you -- well -- now, so if there's a refund
12 back to Navient for any of the costs or fees, is that reflected
13 in this document?

14 A. For refunds?

15 Q. Yes.

16 A. I've never seen that, like, a refund or an adjustment --

17 Q. Well, are you aware that the American Arbitration
18 Association, when there's a dismissal of a case, sometimes
19 refunds the fee that is paid by Navient?

20 A. Correct. Yes.

21 Q. Okay. And where would that be shown on here?

22 A. That would be listed under the fees. It would be a line
23 item.

24 Q. And did you specifically in this case see any refunds of
25 fees from AAA in any of the invoices that you reviewed?

Reinhart - Cross

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1 A. I'm not sure. I reviewed -- as I just said yesterday, it
2 took days to review all these.

3 Q. Well, you actually did say that you reviewed every single
4 invoice, correct?

5 A. I did. As I said, there was a lot of them, so I'm unsure
6 if I saw that or not.

7 Q. Well, you just testified that you never saw an increase in
8 time. Did you ever see a refund in any of these invoices from
9 the American Arbitration Association?

10 A. I'm unsure.

11 Q. Okay. And when you pay the American Arbitration
12 Association fees for an arbitration, it can be 2-, 3,000
13 dollars, correct, or even more?

14 A. Yeah, even more.

15 Q. Okay. So if you get a refund of that, then that would be
16 2-, 3-, 4,000 dollars back to Navient, correct?

17 A. That's correct.

18 Q. And if it was left out, then that would be money that you
19 were trying to charge the Lohman firm that they weren't getting
20 credit for, correct?

21 A. Theoretically.

22 MR. URBAN: Okay. That's all I have, Your Honor.

23 THE COURT: All right. Any redirect?

24 MS. SIMONETTI: No, Your Honor.

25 (Witness excused.)

1 THE COURT: All right. Then there's still the motion
2 to admit these exhibits into evidence. Mr. Charnoff, come up
3 to the lectern if you're going to make an argument.

4 MR. CHARNOFF: Your Honor, I'm going to be very
5 brief. I don't think there's an adequate foundation, and we
6 also have a bridge and 403 problem because there is no
7 testimony from the prior witness that could ever connect --
8 could ever establish reasonableness of the fees. It's more
9 prejudicial than probative for the jury to look at bills that
10 no one's opined that they're reasonable.

11 THE COURT: Well, I'm going to allow it in -- allow
12 them in, and you can argue to the jury the degree to which they
13 want to rely on those documents. But I think there's enough
14 evidence to let them in. All right.

15 (Plaintiff's Exhibit Nos. 915 to 922, 926 to 930, 936
16 to 945, 947, 948, 950, 952, 954, 956 to 959, 961 to 963, 965,
17 967 to 979, 982 to 987, 989 to 997 were received in evidence.)

18 MR. CHARNOFF: Thank you, Your Honor.

19 THE COURT: All right? Does the plaintiff have any
20 further evidence?

21 MS. SIMONETTI: No, Your Honor. We rest.

22 THE COURT: All right, that's fine. I don't want to
23 take up the jury's time unnecessarily with long breaks, so I
24 want to start the defense -- do you have any witnesses you're
25 planning to present?

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1 MR. GRELL: Lohman defendants will call Jeffrey
2 Lohman.

3 THE COURT: All right. All right, Mr. Lohman, you're
4 still under your oath from yesterday.

5 THE WITNESS: Thank you, Your Honor.

6 JEFFREY EDWARD LOHMAN, LOHMAN DEFENDANTS' WITNESS,

7 PREVIOUSLY AFFIRMED, RECALLED

8 DIRECT EXAMINATION

9 BY MR. GRELL:

10 Q. Good morning, Mr. Lohman.

11 A. Good morning.

12 Q. Having just heard Mr. Reinhart's testimony about refunded
13 AAA fees, what is your understanding of whether there were any
14 refunded AAA fees among the arbitrations that were dismissed?

15 A. I'm aware of at least two. There could have been more,
16 but I know for sure there were at least two refunds.

17 Q. And is that a common practice by the AAA, to refund those
18 fees when, when matters are dismissed?

19 A. I would think it would depend on how long the case went on
20 before it was dismissed, but I know of, of quite a few that
21 were dismissed very early on.

22 Q. And why is it that fees are less likely to be dismiss if
23 the case lasts longer before the AAA?

24 A. I'm not sure of AAA's policies on it, but I would just
25 think it's because they've done an adequate amount of work to

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1 justify their fees.

2 Q. Okay. Now, we, we already talked about your arbitration
3 wins, yours meaning the Lohman firm's along with your clients,
4 in *Ibarra* and *McClogan*, right?

5 A. That is correct.

6 Q. And did you have any other arbitration wins?

7 A. Yes.

8 Q. What were they?

9 A. We won in *Shawn Deffenbaugh v. Navient*. We won in *Heidi*
10 *Lewis v. Navient*. We won in *Dallas Stringham v. Navient*. We
11 won in *Angela* -- well, that was an appeal. We won in *Katherine*
12 *Moreno v. Navient* as well. There might be one or two. That's,
13 that's just off the top of my head.

14 Q. What was in?

15 A. I said that was -- there might be one or two more, but
16 that's kind of the --

17 Q. Okay. I'd like to have you take a look at Exhibit 276
18 (sic).

19 THE COURT: All right, Defense 276.

20 THE COURT SECURITY OFFICER: Which binder?

21 MR. GRELL: It would be in -- what did I tell you?
22 3? 3 or 4.

23 2076.

24 Binder No. 2.

25 THE COURT: Binder 2.

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1 All right. Is there any objection to 2076?

2 MR. CALHOUN: I'm having trouble with asking
3 questions on it. I think just admitting a series of old
4 arbitration awards becomes cumulative and is not beneficial.

5 THE COURT: No, I'll overrule that objection. So
6 2076 is in.

7 (Lohman Defendants' Exhibit No. 2076 was received in
8 evidence.)

9 MR. GRELL: All right, Your Honor. We would also
10 offer 20- --

11 THE COURT: Well, are you discussing it at all with
12 the jury or not?

13 MR. GRELL: I'm going to move in a bunch of these
14 exhibits, and then we can come back and discuss them. I think
15 it makes more sense to discuss them as a group for cutting down
16 on time.

17 THE COURT: All right.

18 MR. GRELL: But I can discuss it individually if
19 that's what you'd like.

20 THE COURT: I think the jury will understand the case
21 better if you spend a little bit of time talking to them about
22 what you're moving in. Just dumping a whole bunch of documents
23 doesn't help.

24 MR. GRELL: It's only, it's only three --

25 THE COURT: All right.

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1 MR. GRELL: -- but we can do it one at a time.

2 That's fine.

3 Q. The *Deffenbaugh* case, that was a win for you, correct?

4 A. Yes, it was.

5 Q. And looking at this document, can you tell what the
6 overall result was that was returned to -- that was awarded to
7 Mr. Deffenbaugh in this case?

8 A. On the first paragraph on the third page, it says, "The
9 total award to the claimant is therefore \$35,250."

10 Q. All right. And the date on this award is what?

11 A. November 9, 2017.

12 Q. So when you received this award, how did that impact your,
13 your determination as to whether there was a reasonable basis
14 to bring TCPA claims against Navient going forward?

15 A. You know, this was, I think, exactly a week after the
16 *McClogan* award, so at the time, we had won *McClogan* and
17 *Deffenbaugh*. We did lose *Moore*, but winning two of three, we
18 thought, you know, our cases were pretty solid and they were
19 worth litigating.

20 Q. And you filed additional cases against -- TCPA cases
21 against Navient after the *Deffenbaugh* win, correct?

22 THE COURT: That's leading. I'm sustaining the
23 objection. Let's not lead.

24 BY MR. GRELL:

25 Q. Were you, were you -- what was your intent to go forward

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1 with regard to additional Navient lawsuits?

2 A. Well, it would be to continue to, you know -- what's the
3 word? -- like, uphold our clients' rights.

4 Q. Okay. And taking a look at Exhibit 2082, it should be in
5 that same binder.

6 THE COURT: Any other objection to that, Mr. Calhoun,
7 than what you've said before?

8 MR. CALHOUN: No, Your Honor.

9 THE COURT: All right, then it's in.

10 (Lohman Defendants' Exhibit No. 2082 was received in
11 evidence.)

12 BY MR. GRELL:

13 Q. Can you describe for the jury what that is?

14 A. This is the arbitration award in favor of our client
15 Dallas Stringham.

16 THE COURT: Wait, 282? 2082.

17 MR. GRELL: 2082.

18 THE COURT: That's not the one that I have.

19 THE WITNESS: Oh, I'm sorry.

20 THE COURT: Oh, I'm sorry. Yes, it is. Yes, it is.
21 Stringham? Yep.

22 BY MR. GRELL:

23 Q. And what is the date of that arbitration award?

24 A. July 5, 2018.

25 Q. And what was the award that was received by Mr. Stringham

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1 pursuant to this decision?

2 A. The award of the arbitrator was, I believe, 63,000. It
3 was offset by the amount that Mr. Stringham had owed to Navient
4 at the time based on their counterclaim.

5 Q. And that was, it looks like, about \$20,477?

6 A. That's correct.

7 Q. And what impact, if any, did this have on your, on your
8 strategy of suing Navient under the TCPA?

9 A. I mean, it didn't really change much to our strategy, but
10 we, we felt, you know, that our cases were justified.

11 Q. And take a look at Exhibit 2078.

12 THE COURT: Again, any objection to 2078?

13 MR. CALHOUN: None other than we've already listed.

14 THE COURT: All right, it's in.

15 (Lohman Defendants' Exhibit No. 2078 was received in
16 evidence.)

17 BY MR. GRELL:

18 Q. What is Exhibit 2078?

19 A. It's the arbitration award in favor of our client, Heidi
20 Lewis.

21 Q. And what was the result of, of that proceeding?

22 A. The arbitrator awarded Ms. Lewis \$81,500. There was no
23 counterclaim in that case because Heidi Lewis had paid off her
24 loans.

25 Q. And what is the date of that award?

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1 A. It appears to be January 9, 2018.

2 Q. And what impact, if any, did this award have on your
3 intentions to continue to bring TCPA claims against Navient?

4 A. Again, it just kind of I don't want to say emboldened us,
5 but it made it -- you know, we were justified in these cases.
6 We were, you know, litigating the cases and winning the cases.

7 Q. And you continued -- do you recall the date of your last
8 claim against Navient under the TCPA?

9 A. I know we have some still currently going with them. I
10 think the last case we filed was probably in 2019.

11 Q. Okay. Now, yesterday you were here when Mr. Standish was
12 testifying, and we talked about the unclean hands defense that
13 was asserted by Navient in these arbitration proceedings?

14 A. Yes.

15 Q. And Mr. Standish testified that arbitration did not give
16 them an opportunity to litigate this unclean hands defense?

17 A. Yes.

18 Q. What is your opinion of Mr. Standish's opinion about the
19 ability to litigate the unclean hands defense?

20 A. So I understand what he was saying, but at the same
21 hand -- at the same time, we were always, I mean, from, like,
22 the second or third case, fighting with -- or defending
23 ourselves to their unclean hands defense. So if they ever had
24 an opportunity to argue anything in front of an arbitrator,
25 they almost always took that opportunity to basically make the

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1 same claims they're making in this case, that we had unclean
2 hands in bringing, in bringing these cases, so our client
3 shouldn't recover anything because somehow we were bad
4 attorneys.

5 Q. And to the best of your recollection, what was -- what
6 were the specific facts that they relied upon in asserting this
7 unclean hands defense?

8 A. I know a lot of it revolved around David Mize and that we
9 were this big, bad plaintiff's firm, you know, just making
10 these TCPA claims. I don't remember the specifics of it, but,
11 but that was essentially it.

12 Q. And to the best of your recollection, when was the first
13 time that Navient began asserting this defense?

14 A. It was within the second or third, like -- I don't know if
15 it was all of them, but definitely by the second or third case
16 where we were submitting briefing, they were making this
17 argument.

18 Q. Can you take a look at Exhibit 2090?

19 THE COURT: Any objection to 2090?

20 MR. GRELL: It's already in, I believe.

21 THE COURT: That is in, all right.

22 BY MR. GRELL:

23 Q. Page 6 of 2090. Are you there?

24 A. Yes.

25 Q. What is the caption of Section C on page 6 of Navient's

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1 brief in this *McClogan* case?

2 A. It says "McColgan Lacks Standing or Otherwise Suffers from
3 Unclean Hands."

4 Q. And what is the date of this brief? Turn to the last
5 page.

6 A. September 22, 2017.

7 Q. To the best of your recollection, is that about the time
8 when they started to assert this defense?

9 A. I know *McClogan* was one of our first cases, so yeah, that
10 would have been around the time.

11 Q. And yesterday, when Mr. Standish reviewed the, the
12 arbitration brief in *Salazar*, do you recall what date *Salazar*
13 was being litigated, the time period?

14 A. I, I don't for sure. I actually think Mr. Salazar is a
15 California client, but I think *Salazar* was one of our later
16 cases, so I would say 2018 or 2019.

17 Q. Well, why don't you take a look at Exhibit 2128.

18 THE COURT: That's in a different volume, isn't it?

19 MR. GRELL: It's in the next volume, 3, Your Honor.

20 THE WITNESS: I'm sorry, did you say 2021?

21 MR. GRELL: 2128.

22 THE COURT: 2128.

23 Is that in?

24 MR. GRELL: That's in.

25 THE COURT: It's in already?

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1 THE WITNESS: Okay. I'm there.

2 BY MR. GRELL:

3 Q. So what is Exhibit 2128?

4 A. It looks like another arbitration brief, which, you know,
5 before -- in arbitration, it's not exactly like court. So you
6 still get some limited discovery. You exchange documents.
7 Everyone is supposed to be nice. And then you prepare your
8 case, and before you go in front of an arbitrator, you give
9 them a brief that explains your arguments that you're going to
10 be arguing at that arbitration hearing.

11 The hearings usually only last a day. And then after
12 you present your, your evidence to the arbitrator, then there's
13 a post-arbitration brief to summarize what your -- the facts
14 that you put on in the arbitration.

15 So this, yeah, it says "in advance of the mediation."
16 So I don't know if this was a federal court case or -- in fact,
17 it looks like it was a federal court case, but this was
18 preparing to go to a mediation in federal court.

19 Q. And what is the date of that brief?

20 A. June 14, 2019.

21 Q. And is there an unclean hands defense asserted there by
22 Navient?

23 A. Well, I can tell you section B is titled "Mr. Salazar
24 Defaults and He and His Counsel Manufacture His TCPA Claim."
25 So I would assume that's probably towards an unclean hands

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1 argument.

2 Q. So between September -- now, earlier today, you had an
3 opportunity to review the record of all the arbitration briefs
4 that Navient filed in your cases against them?

5 A. Yes, briefly.

6 Q. And between September 2017 and January 2019, including
7 both pre- and post-arbitration briefs, how many times did
8 Navient make this unclean hands argument?

9 A. It was somewhere around 40.

10 Q. Forty times?

11 A. Around 40 times, yes.

12 Q. How many times did that argument prevail?

13 A. They never won that one time.

14 Q. And they made -- was the argument they made substantially
15 similar from beginning to end?

16 A. You mean from 2017 until today?

17 Q. Until 2019, the last brief.

18 A. Yes.

19 Q. And the *Salazar* brief was filed after they filed the
20 complaint in this action, correct?

21 A. That's correct. I'll say they're still making the
22 argument today in the arbitrations we have ongoing.

23 MR. GRELL: Okay. So, Your Honor, let's -- I would
24 like to give Exhibit 2222 to both you and Mr. Lohman for
25 purposes of identification.

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1 THE COURT: Does opposing counsel have that?

2 MR. GRELL: Yes, they do.

3 MR. CALHOUN: I don't have it.

4 MR. GRELL: What? I gave it to you this morning.

5 MR. CALHOUN: You showed it to me this morning.

6 MR. GRELL: I gave it to you this morning.

7 THE COURT: All right, wait, wait. We don't --

8 MR. CALHOUN: Thank you.

9 BY MR. GRELL:

10 Q. Mr. Lohman, do you recognize Exhibit 2222?

11 A. Yes.

12 Q. What is it?

13 A. It's, it's our comments or notes on Navient's damages list
14 that they presented.

15 Q. When you made -- who, who created that document?

16 A. I think for the most part, I did. I mean, other than
17 taking Navient's chart and adding to it, I made the additions.

18 Q. Okay. And so how did you create this document?

19 A. By looking through records for the law firm and records of
20 cases.

21 Q. And you mentioned -- what, what did you do with Navient's
22 damage chart versus the documents you're looking at through the
23 law firm?

24 A. So, so in this chart, I was looking for two specific
25 things. I was looking for the comparison in their damages

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1 chart for what they're claiming the loan balance was that was
2 forgiven, right, what they're claiming in their damages chart,
3 compared to the actual amount listed in the settlement
4 agreement, and so they changed the verbiage on the vast
5 majority of the settlement agreements, but on three of them, it
6 lists specifically what the balance was of the loan when they
7 were forgiving it as part of a settlement.

8 MR. GRELL: Can you put that up?

9 THE COURT: Now, wait a minute.

10 MR. GRELL: Oh, it's not in yet.

11 THE COURT: It's not in evidence.

12 MR. GRELL: Right, right.

13 Q. So in particular, you're, you're comparing Navient's
14 damage chart to the amount forgiven of debt versus the
15 settlement agreements?

16 A. That's correct. I was comparing it to the settlement
17 agreements.

18 Q. And then under the column "Reason for Dismissal," what
19 does that reflect?

20 A. It's -- because it came up yesterday as far as, you know,
21 these dismissals we had and the reasons for dismissals and I
22 thought it came across like we were just dismissing clients
23 that weren't responsive, so I wanted to go through and look for
24 the reasons for dismissals, and so those -- these are my notes
25 as to the reasons we had for dismissing the client.

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1 Q. So this chart summarizes your, your personal recollection
2 of why cases were dismissed and discrepancies you noticed
3 between the damage chart loan amounts forgiven and the
4 settlement agreement loan amounts forgiven?

5 A. Correct.

6 MR. GRELL: Lohman defendants offer Exhibit 2222.

7 MR. CALHOUN: No objection, Your Honor.

8 MR. CHARNOFF: No objection.

9 THE COURT: All right, then it's in.

10 (Lohman Defendants' Exhibit No. 2222 was received in
11 evidence.)

12 BY MR. GRELL:

13 Q. So, Mr. Lohman, did you notice any discrepancies between
14 the amounts -- the amount of debt claimed as forgiven on
15 Navient's damage chart versus the amount of debt that was
16 actually stated in the settlement agreements?

17 A. So -- yes. I noticed it on, on, I think, three of the --
18 four. Some of the more significant ones were Daniel Centrella,
19 where the settlement agreement stated that the debt that was
20 being written off or forgiven was \$69,264.33, whereas Navient
21 lists on its damages charts that it was damaged to the tune of
22 \$77,793.39.

23 I also note -- again, the few that had the debt
24 actually listed, Breana Givens, it was off just a little bit,
25 but they list their damages at \$14,865.50, whereas the

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1 settlement agreement says \$14,746.15.

2 There's a couple of more. There was one more that
3 was kind of significant, Victoria Smith. The settlement
4 agreement said \$60,783.33, whereas they claimed damages in the
5 amount of \$64,091.69.

6 Q. All right. Then moving on to the "Reasons for Dismissal"
7 column, what recollection do you have as to why the *Acevedo*
8 case was dismissed?

9 A. Well, as you can see, there's a lot of question marks. It
10 appears that there was not an arbitration clause, but I'm not
11 quite certain if it was just because there was not an
12 arbitration clause or because she asked us not to move forward.
13 I know through the e-mails we had with Navient's counsel, it
14 appears that we had trouble locating an arbitration clause.

15 Q. And how about the *Allen* case? Why was that dismissed?

16 A. He had reconsented. We've talked about this a lot, about,
17 you know, advising clients not to go log in, because if you log
18 into their website, I know they say you don't have to agree,
19 but if you log in, it's reconsenting.

20 Q. Hold on a second. And when a client consents to receive
21 robocalls, there's no TCPA violation, correct?

22 A. Yeah, correct.

23 Q. So you gotta drop them.

24 A. Correct. You know, a lot of these dismissals are
25 sometimes -- I don't have in here the date it was filed, but

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1 this was filed 2019. So a lot of times when we dismiss a case,
2 it's because we got evidence, you know, part of that evidence
3 exchange, and it shows that there weren't violations. So we
4 dismissed the case because there's not violations. We're not
5 trying to litigate cases that are, are frivolous or unfounded.
6 There's no point in that.

7 Q. And as, as an attorney, when discovery reveals that you --
8 that what you reasonably believed before you brought the action
9 isn't true, is that sanctionable conduct?

10 A. Yes. Well, not in the AAA, but yes, it is sanctionable
11 conduct. Yes.

12 MR. CALHOUN: I was trying to impose an objection.
13 He just continues to lead.

14 THE COURT: Yes. I'll sustain the objection. You
15 can say "object" as you stand so you get my attention if I'm
16 writing my notes.

17 BY MR. GRELL:

18 Q. Was, was your firm ever sanctioned in any of these cases?

19 A. No. We've never even had the request made.

20 Q. All right. And are there any other -- I mean, the jury
21 will be able to review this as an exhibit, but are there any
22 other dismissals that you want to highlight?

23 A. A lot of our early cases were dismissed because it was
24 Sallie Mae making the phone calls, and I'll tell you, still to
25 this day, I don't know the difference between Sallie Mae and

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1 Navient, and so we had assumed it was Navient who does the
2 collections for Sallie Mae, but it turned out Sallie Mae was
3 doing the calls. So when that was brought to our attention, we
4 would dismiss those.

5 And we brought the case against Sallie Mae. We
6 didn't say there weren't cases. We brought the case against
7 Sallie Mae.

8 And there were a couple like, like *Carlos Johnson*
9 where the law had changed. And again, there's no point in
10 fighting a case if there's no foundation for the case, so we
11 didn't proceed with that one or *Kashimawo*.

12 Q. And I notice that there's the *Helvey* case. There was a
13 lot of -- I notice the *Helvey* case. Why was that dismissed?

14 A. That one was one where we literally, she fell off the face
15 of the earth. I mean, she retained us, she was participating
16 at the beginning and then just stopped responding altogether.

17 Q. Would you take a look at Exhibit 2033?

18 THE COURT: I don't have that up here.

19 THE WITNESS: Yes, I'm there.

20 BY MR. GRELL:

21 Q. And this -- what did you say about whether she retained
22 you?

23 A. I said she retained us.

24 Q. And that meant she agreed to the terms of your engagement
25 letter?

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1 A. Yes, of course.

2 Q. Okay. And was that engagement letter similar to the one
3 that was admitted earlier, the one with Brandy Mayer through
4 Mr. Muhtaseb?

5 A. Yes. They were -- they've always been the same for the
6 most part.

7 Q. Okay.

8 THE COURT: Was 2033 already in?

9 MR. GRELL: No, Your Honor, it was not.

10 THE COURT: Was there any -- are you moving it in?

11 MR. GRELL: Defendants will move 2033.

12 THE COURT: Any objection to 2033?

13 MR. CHARNOFF: No objection.

14 THE COURT: No? All right, then it's in.

15 (Lohman Defendants' Exhibit No. 2033 was received in
16 evidence.)

17 BY MR. GRELL:

18 Q. What is Exhibit 2033?

19 A. This is a notice of voluntary dismissal in federal court.

20 Q. And in what matter was this filed?

21 A. This was the *Shanna Helvey v. Navient Solutions, LLC*.

22 Q. And can you explain the voluntary dismissal process, what
23 has to occur for a voluntary dismissal to take place?

24 A. I believe at this point, in -- so when you file a case in
25 federal court, up to a certain point, as a plaintiff, you could

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1 just dismiss without getting permission from the defendant, but
2 after a certain point, and off the top of my head I don't
3 remember where that is, but at a certain point, you need the
4 defendant's permission to be able to dismiss a case, because
5 otherwise, if they believe you brought the case frivolously,
6 they could go after you for sanctions in federal court for, you
7 know, all the time and costs that they spent in trying to
8 defend a matter that they would have believed was brought
9 frivolously.

10 Q. And by looking at Exhibit 2033, can you determine whether
11 Navient consented to this dismissal?

12 A. Yeah, we both agreed. So it says "The parties" -- meaning
13 both of us -- well, meaning Shanna Helvey and Navient
14 Solutions -- "through their undersigned attorneys, stipulate to
15 dismissal."

16 Q. And Navient's lawyers signed that dismissal?

17 A. Yes, they did.

18 Q. And their language in that states that the dismissal is
19 without prejudice. What does that mean?

20 A. It means -- so if you -- if it's -- if something is done
21 with prejudice, it means that someone cannot bring the case
22 again. Without prejudice means that you could at a later time
23 bring it.

24 Q. So if she resurfaced at some point, you could represent
25 her again and bring it later, correct?

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1 A. She could go hire another attorney and bring it again.

2 Q. Or hire another one?

3 A. Yeah.

4 Q. Is there any -- what does the document indicate about
5 recovering costs and fees against you by Navient?

6 A. I mean, this document itself doesn't, doesn't discuss
7 the -- any terms or anything like that for agreeing to dismiss.

8 Q. Do you recall whether Navient made a request for fees
9 after you dismissed this *Helvey* case?

10 A. No, I don't believe they've ever requested fees. Anytime
11 we've dismissed a case, it's always been with both parties
12 handling their own attorneys' fees or covering the costs of
13 their attorneys.

14 Q. All right, thank you.

15 Do you have any understanding of what causes a
16 person's credit core -- credit score to drop?

17 A. I practice in FCRA, but it's like all algorithms. It's
18 all -- I don't know much more than the average person, I guess
19 is what I'm trying to say, as far as what causes a person's
20 credit score to drop.

21 Q. But what is your understanding of what causes a score to
22 drop?

23 A. Late notices on, on the credit report, you know,
24 charge-off notices on a credit report, stuff like that.

25 Q. Who, who informs the credit bureaus of those late

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1 payments, defaults, whatever?

2 A. I think the term is "furnishers," but that would be just
3 anyone who reports to the credit reporting agency. So
4 Discover, Capital One, Navient, anyone that reports to the
5 credit reporting agencies.

6 Q. Okay. I may be paraphrasing Mr. Calhoun, but he asked
7 during your cross yesterday if you cared about the reputation
8 of your referral sources. Do you recall that?

9 A. Yes.

10 Q. And could you expound upon the relationship between you
11 and your clients and referral sources?

12 A. Yeah. I mean, going off of what Mr. Calhoun was asking
13 yesterday, I mean, I do care to a certain extent who my
14 referral sources are. As I mentioned, Amanda Johanson, I made
15 the decision very early on -- made a decision very early on to
16 not work with Ms. Johanson, and there's been others in the past
17 as well, but once a client retains an attorney, the attorney
18 has a duty to represent the client.

19 So my duty is not to any marketing source or any
20 other attorney that referred me the source. I have an ethical
21 duty to the client that, you know, if things come up through
22 discovery, you know, if things come up where -- even if the
23 client testified that David Mize told her to stop making
24 payments, that doesn't change the case. It doesn't change my
25 duty to my client. My duty to, to my client is to represent

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1 them.

2 And I think under most ethical rules, at least the
3 ones I'm aware of, I'm not allowed to just walk away from a
4 client because I don't like the client or I don't like a
5 referral source. I have a duty to that client to, you know,
6 see it all the way through.

7 So yeah, you know, stuff came up through discovery,
8 but our duty at the end of the day was always to the client,
9 and unless the client told us to withdraw and go away, our duty
10 always remains to the client.

11 Q. And when looking at, at the basis for a TCPA claim, what
12 is the primary fact that you're looking at with regard to
13 potential clients?

14 A. We're only looking at two things: did the, did the caller
15 have permission to use an autodialer, and does the call
16 behavior look like it's coming from an autodialer. That's it.

17 Q. Okay. Again, I don't want to misstate Mr. Calhoun, but I
18 believe yesterday he asked if you considered your clients
19 people or leads. Do you recall that question?

20 A. He was saying something about the leads coming over. Yes,
21 I remember the conversation. Yes, I do remember.

22 Q. Do you consider your clients simply leads?

23 A. So what I explained to Mr. Calhoun is we get a lot of
24 leads, right? You know, at some point, we were getting 2,500 a
25 month. But once a client retains us, then it, then it becomes

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1 really personal.

2 So, you know, we get 2,000 people, but only 50 retain
3 us. So then it's personal. Then we're interacting with them.
4 We're talking to them. We're getting them through the case and
5 going through discovery and showing up with them at
6 depositions, and there's a lot to it. It gets very personal
7 with clients once, once a client retains us and we're taking
8 their case and moving forward with the case.

9 Q. And how do most of your clients feel about going up
10 against a company like Navient?

11 MR. CALHOUN: Objection, Your Honor.

12 THE COURT: I'm going to sustain that. You can lay
13 a -- express a question differently for which he might have a
14 foundation.

15 BY MR. GRELL:

16 Q. What is your perception as a, as a lawyer -- well, let's
17 ask it -- what is your perception as a lawyer of your -- do
18 your clients want to sue Navient?

19 A. I mean, they do --

20 THE COURT: Wait, wait, wait. There's still an
21 objection.

22 MR. CALHOUN: Same objection. He's asking what other
23 people think.

24 THE COURT: Yeah. You can't ask what other people
25 think. You can ask what they may have told you about if it's

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1 not being offered for the truth of its contents.

2 BY MR. GRELL:

3 Q. Does your clients' -- what have your clients told you they
4 think about suing Navient?

5 THE COURT: Well, I think that's too broad a
6 question.

7 MR. CALHOUN: And it calls for hearsay.

8 MR. GRELL: It goes to his --

9 THE COURT: Not if it's -- not if it's offered for
10 the truth -- if it's not being offered for the truth of its
11 contents, but I think you have to make it less general. Make
12 it more specific.

13 BY MR. GRELL:

14 Q. What level of enthusiasm do your clients have in terms of
15 what they've expressed to you in suing Navient?

16 A. So I don't think anyone, at least my clients, are thrilled
17 about the idea of going into a lawsuit, but they want to
18 vindicate their rights, and they feel harassed.

19 And I, I think it was Amanda Fine who used the word
20 "bullied" when she was getting deposed, and Cynthia Baldon
21 talked about just the overwhelming anxiety she had, where she
22 couldn't even go outside of the house.

23 So, you know, all of these clients, it was their very
24 first case they had ever, like, litigated and moved forward
25 with, and so there was a lot of anxiety over it, a lot of, you

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1 know, just worry, I guess. But that's -- being a consumer
2 protection plaintiff's attorney, these are the people that,
3 that we help.

4 So, so yeah. I mean, they wanted to vindicate
5 themselves. They wanted, they wanted to, you know, someone to
6 say that what Navient was doing was wrong in the harassment,
7 and they moved forward with it, and I was very proud of them to
8 go through that.

9 BY MR. GRELL:

10 Q. And how has your clients' experience against Navient
11 affected you in terms of defending this litigation?

12 A. I wouldn't settle because, because I couldn't ask them to
13 fight Navient and not do it myself.

14 MR. GRELL: Okay. I have nothing further.

15 THE COURT: All right. Mr. Calhoun?

16 Mr. Charnoff, did you have any questions for
17 Mr. Lohman?

18 MR. CHARNOFF: I do not, Your Honor.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 BY MR. CALHOUN:

22 Q. Mr. Lohman, you mentioned during your direct examination
23 that you'd seen things come up in discovery concerning some of
24 your referral sources. Do I recall that testimony correctly?

25 A. Yes.

Lohman - Cross

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1 Q. All right. And that you -- you mentioned that you still
2 had a duty to the clients in those cases; is that right?

3 A. Yes.

4 Q. All right. But, for example, you continued to accept --
5 did you see some of those things come up with Mr. Mize?

6 A. Through -- again, through discovery, you know, we, we
7 saw -- we saw everything that was discovered through discovery.

8 Q. All right. And you kept accepting referrals from
9 Mr. Mize, didn't you?

10 A. That's a good question. I don't actually know when I
11 stopped accepting referrals from David Mize. I, I think he
12 stopped getting clients in, like, 2018, and most of the stuff
13 was litigated late 2017-2018.

14 Q. And you continued to work with Mr. Mize, right?

15 A. I didn't see anything that would cause concern for me to
16 not accept referrals from Mr. Mize.

17 Q. And you continued to accept referrals from Jacob Slaughter
18 when he was practicing, correct?

19 A. When he had -- we had very few from Jacob Slaughter, but
20 yes, we did accept referrals from him.

21 Q. Can you look at Exhibit 44, please?

22 THE COURT: Plaintiff's 44 is what volume?

23 MR. CALHOUN: I'm sorry, Your Honor, it is
24 Exhibit 3 -- Binder 3.

25 THE COURT: Okay.

Lohman - Cross

1111

1 MR. CALHOUN: It's in evidence.

2 THE COURT: So you can put it on the screen. You can
3 put it on the screen so the jury can see it.

4 BY MR. CALHOUN:

5 Q. I think you should -- I think it's Interrogatory 3 where
6 you list the referrals from Jacob Slaughter.

7 A. Sorry, give me one moment.

8 THE COURT: It starts on page 7.

9 THE WITNESS: Yes.

10 BY MR. CALHOUN:

11 Q. All right. This is what you're referring to as a few
12 referrals?

13 A. Yes.

14 Q. And it's how many pages?

15 A. One, two, three, four, five. One, two, three, four, five.

16 So there's about 40 per page and there's 5 pages'
17 worth, so that would be about 200 referrals. But again, at
18 that time, I was getting about 2,500 a month.

19 Q. Can you look at Exhibit 1002, please?

20 THE COURT SECURITY OFFICER: Which binder is that?

21 MR. CALHOUN: It's the last one, which is 23.

22 THE WITNESS: Am I looking at an arbitration award?

23 BY MR. CALHOUN:

24 Q. You are. Do you recognize this award?

25 A. Yes, I do.

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1 MR. CALHOUN: All right. We'd offer Exhibit 1002.

2 THE COURT: Any objection to 1002?

3 MR. GRELL: No, Your Honor.

4 THE COURT: All right, it's in.

5 (Plaintiff's Exhibit No. 1002 was received in
6 evidence.)

7 BY MR. CALHOUN:

8 Q. Can you turn to the third page, please?

9 A. Yes.

10 Q. Can you read the last -- first full sentence of the last
11 paragraph for us, please?

12 A. The one that says "The authorities"?

13 Q. Correct.

14 A. "The authorities cited by Navient and the reasoning
15 therein are compelling in this case, and a preponderance of the
16 credible evidence confirms the Navient system, as used, did not
17 have the capacity to store or produce telephone numbers to be
18 called using a random or sequential number generator."

19 Q. And the arbitrator in this case decided that Navient was
20 not using an ATDS, correct?

21 A. That's correct.

22 Q. And this decision didn't dissuade you from bringing other
23 cases against Navient?

24 A. What date was this? 2018.

25 So just as Mr. Standish testified to yesterday, it's

Lohman - Cross

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1 very jurisdictional. It's very -- there's a lot of competing
2 case law. So in Texas at this time, in fact, up until
3 recently, Texas never had really an authority of what ATDS was.
4 So Navient and us went and fought it, and the arbitrator chose
5 to follow case law out of the Third Circuit, whereas we were
6 arguing case law out of the Ninth Circuit.

7 Q. All right. And there's no longer any dispute about that,
8 is there?

9 A. Yes, there is.

10 MR. GRELL: Objection.

11 THE COURT: Sustained.

12 MR. GRELL: And, Your Honor, this is the third time
13 they've tried to go around --

14 THE COURT: Look, the law -- the purpose of this case
15 was that the law as to the TCPA was unclear as to whether or
16 not Navient did, in fact, violate that statute in that time
17 period. We shouldn't be arguing about this at this point.

18 MR. GRELL: Well --

19 THE COURT: No, that's enough.

20 BY MR. CALHOUN:

21 Q. Mr. Lohman, you have testified about your -- about some of
22 the dismissals and the, and the settlements. Do you recall
23 discussing with Navient the possibility of including mutual
24 releases in the settlement agreements?

25 A. If I understand your question correctly, it would have

Lohman - Cross

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1 only been a recent settlement in which Navient changed the
2 terms in their form agreements, and it would have been a
3 California case which Mr. Branch was discussing with Navient's
4 counsel.

5 MR. URBAN: Your Honor, I'm going to object that this
6 is well beyond the scope of direct. We didn't talk about the
7 releases.

8 THE COURT: Well, we talked about the settlements. I
9 think it's sufficiently within, I'll permit it, but this
10 question was somewhat vague. I'm not sure anybody understood
11 where we were going with that.

12 BY MR. CALHOUN:

13 Q. So I don't recall your answer exactly. You don't remember
14 discussing --

15 A. I said if I understand your question correctly, it was a
16 recent settlement, like, last year, in which Navient changed
17 some of the terms in its release, and we asked for the mutual
18 release to be put back in.

19 MR. URBAN: And I'd further object this is beyond the
20 time period that this lawsuit falls.

21 THE COURT: Well, that's -- do we have a time -- what
22 time period are you talking about?

23 MR. CALHOUN: Your Honor, I'm going to bring it back.

24 THE COURT: All right, let me hear.

25 BY MR. CALHOUN:

Lohman - Cross

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1 Q. What time period did Ms. Dykes work at your law firm?

2 A. 2017-2018.

3 Q. All right. And do you remember having a discussion with
4 her about the possibility of including mutual releases and
5 settlements with Navient?

6 A. Not as I sit here today, no.

7 Q. All right. Can you take a look at page 183 of your
8 deposition, please?

9 A. Is it in this binder?

10 THE COURT: No. We have to get it back to you.

11 MR. CALHOUN: Do you still have it, Your Honor?

12 THE COURT: Which volume is it in?

13 MR. CALHOUN: It's in the --

14 THE COURT: There were two different dates, aren't
15 there?

16 MR. CALHOUN: Yeah. It's the June 1, 2020,
17 deposition.

18 THE COURT: June 1?

19 MR. CALHOUN: It's the really big one.

20 THE COURT: What page?

21 MR. CALHOUN: It's 183 on to 184.

22 THE COURT: I'm sorry?

23 MR. CALHOUN: 183 and then over on to 184. We were
24 discussing an e-mail at the time.

25 Q. You may recall this, Mr. Lohman.

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1 THE COURT: Wait, wait. Just ask the question. What
2 line are we looking at?

3 BY MR. CALHOUN:

4 Q. All right. First, if you look at the question that begins
5 on line 24 of 183, Your Honor -- or Mr. Lohman -- and I asked
6 you, "And did you do anything in response to this e-mail in
7 particular?"

8 How did you respond?

9 MR. GRELL: Objection, Your Honor. There's no
10 context. What is this e-mail?

11 THE COURT: Yeah, there's no context, so you need to
12 have -- why don't you ask a foundation question. Maybe he can
13 testify without needing the deposition.

14 BY MR. CALHOUN:

15 Q. So do you recall an e-mail discussion with Ms. Dykes where
16 she had discussed whether or not you should ask Navient to
17 destroy transcripts after arbitrations?

18 A. I mean, that sounds like a conversation I would have had
19 with her. Do I remember the specific conversation? I don't
20 remember the specific conversation.

21 Q. All right. In the context of that discussion, do you
22 recall saying anything about modifying Navient's settlement
23 agreement to include mutual releases?

24 A. Again, I don't remember the specific conversation, so it
25 sounds -- I mean, if you want me to read the -- in this, I say

Lohman - Redirect

1117

1 I do, but --

2 Q. And do you recall --

3 A. So -- and even in my comment here, it doesn't say that I
4 discussed it regarding that e-mail. It just -- I added that to
5 the conversation, saying we've discussed, like, I've discussed
6 with my firm modifying Navient settlement agreements.

7 Q. And did Navient agree to do that?

8 A. Well, they have, I mean, but they modified it, but not in
9 the way we were looking for, no.

10 MR. CALHOUN: No further questions, Your Honor.

11 THE COURT: All right. Is there any redirect?

12 REDIRECT EXAMINATION

13 BY MR. GRELL:

14 Q. Do you recall the settlement agreement in which this
15 mutual -- do you have any recollection of a settlement
16 agreement in which this mutual release discussion occurred?

17 A. Yeah. The settlement agreements we've been discussing,
18 yes.

19 Q. No, the particular one that I believe you mentioned,
20 Charla --

21 A. I don't. Again, it was a California case, and I have to
22 disconnect myself because I'm not licensed in California, but I
23 live in California, so --

24 Q. Well --

25 THE COURT: Wait. Once again, we're using a quasi-

Lohman - Redirect

1118

1 legal term which the jury may not understand. What do you
2 understand as a lawyer mutual releases are?

3 THE WITNESS: So it, it kind of goes back to what
4 our -- a mutual release is a clause that releases liability
5 with all the parties or at least, at least two parties to the
6 agreement, so that there's no longer liability, to the best of
7 my understanding.

8 BY MR. GRELL:

9 Q. And you said that Navient made some changes to their
10 settlement agreements over the course of time?

11 A. Again, I remember --

12 MR. CALHOUN: Objection, Your Honor.

13 THE COURT: Wait.

14 MR. CALHOUN: I believe that the objection heard
15 before, that this -- what he's talking about now occurred after
16 the case.

17 THE COURT: Well, we want to have it within the
18 proper time frame. That was your objection before. All right.

19 MR. GRELL: Okay. We don't have any further
20 questions.

21 THE COURT: All right. Again, anything from you,
22 Mr. Charnoff? Anything further?

23 MR. CHARNOFF: Thank you, Your Honor. I don't think
24 I have any questions.

25 THE COURT: All right. Mr. Lohman, you may step

1 down.

2 THE WITNESS: Thank you

3 (Witness excused.)

4 MR. GRELL: The Lohman defendants rest.

5 THE COURT: All right. And, Mr. Charnoff, is there
6 any further evidence you want to put on?

7 MR. CHARNOFF: No, Your Honor. We will not be
8 putting on evidence.

9 THE COURT: All right, defense is resting.

10 Mr. Calhoun, is there a rebuttal case that you plan
11 to put on?

12 MR. CALHOUN: We would call Mr. Harvey, Your Honor.

13 THE COURT: All right. How, how long do you
14 anticipate Mr. Harvey would take?

15 MR. CALHOUN: Fifteen minutes.

16 MR. CHARNOFF: Your Honor?

17 THE COURT: Yes.

18 MR. CHARNOFF: To be clear, Mr. Harvey would be an
19 expert witness. No expert witness was put on in the defense
20 case. There's nothing to rebut. And Your Honor already ruled
21 on the motion in limine he's not going to testify.

22 THE COURT: He's going to be rebutting what, the
23 testimony of Mr. Travell?

24 MR. CALHOUN: Correct, Your Honor.

25 MR. CHARNOFF: It's his witness.

1 MR. URBAN: Your Honor, they can't rebut themselves.
2 They are the ones who put on Mr. Travell. We did not. So --

3 THE COURT: Counsel, one at a time at the lectern. I
4 don't want two people at the lectern at the same time.

5 MR. URBAN: I just want to make clear our objection.
6 How can they rebut something that never happened? We did not
7 bring Mr. Travell in our case. They chose to bring him in
8 their case. So they're rebutting their own evidence.

9 THE COURT: All right.

10 MR. URBAN: We did not bring him in our case.

11 MR. CALHOUN: Your Honor, I don't know if we should
12 approach on this, but this was all the subject of a motion in
13 limine, and originally, we were going to bring them both in our
14 case, and at the end, you said -- you first said you can bring
15 them both, and then at the end, you said you'd have to bring
16 them in in rebuttal. So --

17 THE COURT: I did say that. They could have called
18 Mr. -- they could have called this witness in their
19 case-in-chief.

20 MR. URBAN: Your Honor --

21 THE COURT: Although your objection at the motion in
22 limine -- and I may have to go over the transcript on how we
23 ruled on that one.

24 MR. URBAN: I think you may.

25 THE COURT: In the motion in limine discussion, I

1 think the jury doesn't need to sit here and hear this.

2 MR. URBAN: Yes, Your Honor, absolutely.

3 THE COURT: Folks, why don't I let you go for your
4 lunch break, and I'll ask you to come back at two o'clock, all
5 right? But I don't want you to start discussing or thinking
6 about the case because, again, you haven't gotten the Court's
7 instructions, you haven't heard the closing arguments of
8 counsel. So just, again, continue to follow my earlier
9 instructions. See you back here at two o'clock.

10 (Jury out.)

11 THE COURT: All right. Now, remind me, because I've
12 had a million cases since we did the motions in limine, was
13 Mr. Harvey, was he during the discovery process, was he
14 designated as a plaintiff's expert?

15 MR. CALHOUN: We designated him as a rebuttal expert
16 in the discovery process well over a year ago.

17 THE COURT: All right. Was he deposed?

18 MR. CALHOUN: He was not by their choice.

19 THE COURT: All right. And the rebuttal that he did
20 involves reviewing Mr. Travell's report?

21 MR. CALHOUN: It does. He primarily responds, Your
22 Honor, to the idea that in order to prove reasonableness, we
23 must go to every jurisdiction and have a different expert
24 testify about the rates in every jurisdiction in which one of
25 these arbitrations took place.

1 THE COURT: And that's the total scope of his
2 testimony?

3 MR. CALHOUN: No. He does testify, Your Honor -- he
4 does state that he believes the rates are reasonable under
5 *Vienna Metro* and the other matrices used in this district.

6 THE COURT: All right.

7 MR. URBAN: It says right in his report, very -- the
8 third sentence: "I have been asked to rebut where appropriate
9 the opinions of Wayne Travell."

10 That's all he was designated for, Your Honor, nothing
11 else. So I don't know what opinion that they brought up,
12 because we didn't bring up any opinions other than in cross,
13 but they're the ones who brought up the opinions, and now
14 they're going to bring in an expert to rebut the expert that
15 they brought in?

16 I've never seen that before, Your Honor.

17 THE COURT: Well, it may be a first, but, I mean, it
18 can't come as any surprise. We discussed this at the motion in
19 limine.

20 MR. URBAN: Right. And the understanding was that
21 all the experts were going to be limited to the scope of their
22 report. Mr. Harvey's report is to rebut the testimony of
23 Mr. Travell.

24 THE COURT: And in his report, that's what was
25 produced in discovery, which everybody knew about, is there a

1 statement in that report in which he addresses this issue about
2 you don't need to have an expert from each jurisdiction talk
3 about what the hourly -- reasonable hourly rate would be?

4 MR. URBAN: Oh, yes, he does say that. I'm fine -- I
5 mean, again, I don't know that that's anything that Mr. Travell
6 brought up other -- but if that's the limit of what they're
7 going to talk about, I think I'd have a hard time, but they're
8 also saying they're going to bring up whether the fees were
9 reasonable.

10 Mr. Travell specifically did not opine on that, so
11 how can Mr. Harvey rebut something that Mr. Travell didn't say?

12 THE COURT: Actually, I'm trying to recall, because
13 he just testified, but I've been on the bench since nine this
14 morning. Did he actually draw the final conclusion that they
15 were not reasonable? I think he just said --

16 MR. CALHOUN: He testified that he could not.

17 THE COURT: -- that he could not.

18 MR. URBAN: He could not do that.

19 MR. CALHOUN: But someone else looking at those same
20 things can. And, Your Honor, this is little bit of sandbagging
21 because we had this out in a motion in limine. Your Honor
22 ruled that we could do it this way and --

23 THE COURT: Yeah, I'm permitting it. I don't think
24 it -- I don't think it's unfair. I don't think it takes anyone
25 by surprise. As long as it was there in the discovery, as long

1 as everybody was on notice as to what it was, I'm going to
2 permit it.

3 MR. URBAN: This --

4 MR. CALHOUN: And we will not go beyond the four
5 corners of the document, Your Honor.

6 THE COURT: I'm going to permit it.

7 MR. CHARNOFF: Your Honor, can I finish making my
8 record, please?

9 THE COURT: Yes, make your record.

10 MR. URBAN: Yeah. Let me just say I state my
11 original objection to any of this coming in just because they
12 had made the decision not to designate an expert in the first
13 place. It seems like we're being punished for actually
14 designating an expert in our case.

15 THE COURT: All right. That's just litigation and --
16 anyway.

17 All right, Mr. Charnoff, for the record?

18 MR. CHARNOFF: Very briefly, Your Honor. Again, I
19 just want to reincorporate all the authorities and the
20 arguments made in the motion in limine. This plaintiff never
21 designated an expert witness for their case-in-chief.

22 In the motion in limine hearing, you decided to let
23 the plaintiff call the defense expert in their case-in-chief,
24 over my objection certainly.

25 THE COURT: Right.

1 MR. CHARNOFF: You allowed them to do it. He's
2 testified. They have no evidence of reasonableness in their
3 case.

4 The defense made a choice to not put on any expert
5 testimony as to fees in the defense case. If I would have
6 named an expert and brought him here today, I would have told
7 him to go home before lunch because there's nothing to rebut,
8 and now they're going to put a rebuttal case on.

9 THE COURT: But the expert whom you did choose,
10 Mr. Travell, right, in discovery, he was your expert in
11 discovery.

12 MR. CHARNOFF: He was not my expert, Your Honor. I
13 made the correct decision to not name an expert witness on the
14 reasonableness of attorneys' fees because I had no one to
15 oppose. When they -- it's -- Judge, I mean --

16 THE COURT: Okay. But an expert was designated by
17 the defense side.

18 MR. CHARNOFF: But not by me. And we didn't choose
19 to put him on.

20 MR. CALHOUN: Your Honor, this is rehash. We had
21 this out --

22 THE COURT: All right.

23 MR. CHARNOFF: Let me just make my record and I'll
24 sit down, Judge. We are not required to put anybody on the
25 stand. I have made a decision, for example, factually to not

1 put forward any further evidence in the case because I don't
2 think I need to.

3 If we would -- if they would have done it the right
4 way, if Navient names an expert witness on fees, I name an
5 opposition expert, and then they name a rebuttal expert, that's
6 how we normally do things. That's following the rules of
7 federal evidence. That's following all the orders in this
8 case, including the specific orders that we fashioned for this
9 case.

10 If they put on an expert witness that they put on as
11 evidence and I elect for tactical other reasons to not put on
12 an opposing expert, because I don't think they met their burden
13 in any number of ways and I don't need anything else in the
14 record, how can then they put a rebuttal expert on to rebut an
15 opposition expert I didn't put on?

16 I can't begin to wrap my mind around it, Your Honor,
17 and it's fundamentally unfair to the defense. And I, I made
18 the decision a year ago, expecting this Court to follow the
19 rules.

20 So on behalf of my clients, I want to make it very
21 clear on the record I object to Mr. Harvey taking the stand and
22 saying a single word. Thank you.

23 THE COURT: All right.

24 MR. CALHOUN: Your Honor, it's, it's almost comical.
25 They repeat objections in the hope that if they say them often

1 enough, you will accept them.

2 They have had Mr. Harvey's report for well over a
3 year. If they had concerns about the contents of that report,
4 they could have come to you and said, we need more time to
5 depose him. They had time to depose him. They could have
6 asked for even more.

7 They had our witness list. We had a motion in -- he
8 was on our case-in-chief witness list. We had a motion in
9 limine about this. We asked to call him. They could have
10 asked to depose him. They still didn't want to.

11 Your Honor, I think just it is -- we ought to just
12 stick with the decisions that have already been made. We would
13 have preferred to call him in our case-in-chief given the
14 awkwardness of calling an opposing expert in our case-in-chief,
15 but we're going to have him on for 15 minutes. We should get
16 the testimony in and get back to the, you know, the rest of the
17 case.

18 THE COURT: All right. Mr. Urban?

19 MR. URBAN: And I just wanted to -- this Court always
20 has the opportunity to change its mind, especially given -- I
21 don't think it's funny, Mr. Calhoun. I don't know what you're
22 laughing about.

23 But this Court has the opportunity at any point to
24 change its mind, especially in the context of the trial as the
25 evidence is presented.

1 In this case, we designated an expert because they
2 might have come up somehow with some evidence of
3 reasonableness. I don't know how they would have done it
4 without an expert, but they could have.

5 They didn't. So that's why we chose not to call
6 Mr. Travell, because there was no evidence of reasonableness.

7 So now on the rebuttal case, for the very first time,
8 they're going to introduce evidence of reasonableness. That's
9 not appropriate. The rebuttal case is not to clean up the
10 things you didn't do in your case-in-chief. It's to rebut the
11 evidence that is put on by the defendant in their case.

12 THE COURT: Well, it is true that, I mean, your
13 expert did not say they were unreasonable. He said he could
14 not determine whether they were reasonable.

15 MR. URBAN: But we didn't call him. I would agree
16 with you, if we called him in our case, you would be dead right
17 that they would have the opportunity to make that
18 determination. We would not have called Mr. Travell based on
19 the evidence that they presented in their case-in-chief other
20 than Mr. Travell himself, but they called him. We would not
21 have brought him, period.

22 And now they're trying to fix something that they
23 didn't do in their case-in-chief, and I just think that's
24 wholly inappropriate.

25 Now, the first part -- well, I don't think any of it

1 is appropriate, but I can see allowing them -- him to talk
2 about he thinks that, you know, every jurisdiction is the same
3 on attorneys' fees and, you know, South Dakota has the same
4 reasonableness as Virginia, if that's what they want to put on,
5 but the question of reasonableness of attorneys' fees is
6 something they should have established, and we were not going
7 to bring it up if they didn't establish it in their
8 case-in-chief.

9 They brought Mr. Travell in. So I don't think it's
10 appropriate that they be able to clean up their mistakes for
11 not designating an expert for their case-in-chief.

12 MR. CALHOUN: Your Honor, a couple things here. One,
13 they didn't need to call him because they crossed him and
14 elicited the testimony that they wanted. He made statements
15 that are subject to rebuttal.

16 Your Honor, frankly, like I said, he was on our
17 case-in-chief list. There was -- there's a standard for
18 dealing with that issue. Your Honor has already addressed it.
19 There's no surprise or unfairness to them.

20 There's evidence also in the record on reasonableness
21 from, from Navient's witnesses about their billing practices
22 and how these bills were reviewed. The jury is entitled to
23 make the decision as to reasonableness.

24 You know, we raised the issue of whether you would
25 hear this separately and we'd do the normal fee review process,

1 but when you send it to a jury, the jury gets to make that
2 decision, and we think this would be helpful to the jury to
3 have Mr. Harvey explain how national counsel work and why
4 that's a good decision and actually reduces the overall amount
5 of fees.

6 You know, as much as they want to talk about -- you
7 know, we raised this. This was raised at the motions in limine
8 hearing.

9 THE COURT: Yeah, I know.

10 MR. CALHOUN: And it's, you know, the last witness.
11 To change it now would be manifestly unfair.

12 MR. URBAN: Your Honor, now they're going to add a
13 new thing. They're going to talk about national counsel.
14 That's nothing we talked about in our case -- in defendants'
15 case-in-chief, so how are they rebutting anything? Again, he's
16 a rebuttal witness.

17 MR. CALHOUN: That's exactly what -- that's what he
18 is.

19 THE COURT: Well, the problem is "to rebut" means
20 you're -- something was said in the other party's case and you
21 are presenting evidence that differs with that, that rebuts it,
22 and the problem is the way this case has gone in is that the
23 evidence as to reasonableness of the attorneys' fees has
24 actually not really been rebutted by Mr. Travell at all because
25 he didn't say they were unreasonable.

1 MR. URBAN: Right.

2 THE COURT: He was just saying, I can't figure out
3 anything about them.

4 MR. CALHOUN: And the reason he said that is because
5 he doesn't know the rates in all these jurisdictions.

6 THE COURT: Well, that's not the only reason, no. He
7 said he couldn't figure out what the, what the --

8 MR. URBAN: -- redactions were.

9 THE COURT: What the redactions were.

10 So you actually have no evidence in this case whether
11 they're reasonable or unreasonable.

12 MR. URBAN: Right.

13 MR. CALHOUN: We have evidence of the reasonableness
14 through the --

15 THE COURT: Well, you can argue that the method in
16 which you went about looking at them and handling them is
17 reasonable, and there's evidence of that in the record right
18 now.

19 MR. URBAN: They can argue it to the jury, sure.

20 THE COURT: The question is, though, from
21 Mr. Charnoff, I think it was his comment earlier on, that he's
22 going to try to make an argument that Mr. Travell -- or that
23 any, any statement about the reasonableness of attorneys' --
24 well, again, the word "reasonable" was never used. The issue
25 about attorneys' fees, that Mr. Travell was only licensed in

1 Virginia, Maryland, and D.C., but he didn't opine about --
2 yeah.

3 There's nothing to rebut.

4 MR. CALHOUN: Your Honor --

5 THE COURT: There's -- it doesn't hurt you. It
6 doesn't help you. There's nothing to rebut.

7 MR. CALHOUN: It does, Your Honor. It very much
8 does, and I think we ought to be allowed to present our case as
9 we were informed in the motions in limine. We asked to call
10 him in our case-in-chief, which would have been the way to do
11 it.

12 THE COURT: But you had an objection there because he
13 was only designated as a rebuttal.

14 MR. CALHOUN: That's correct, Your Honor, but the law
15 is very clear that they have to show prejudice in order to keep
16 him out. They've known about his opinions that are set forth
17 in his report for well over a year, well over a year.

18 There's no -- the cases where an expert's been not
19 allowed to testify because he was designated rebuttal or
20 something is when they're designated at trial or during a trial
21 or a week before trial, not 14 months before trial.

22 THE COURT: All right. Well, I'm going to make the
23 call because I will make the call. If it's wrong, it's wrong.
24 I'm going to let him testify, and I'll allow defense counsel to
25 vigorously cross-examine.

1 Do you want to do -- well, we have to wait until the
2 jury comes back. So you're going to get your -- a shortened
3 lunch break because I want to get the jury back in at two.

4 MR. URBAN: Can I just address one fact regarding
5 that last argument?

6 THE COURT: Yeah.

7 MR. URBAN: Because I've heard it before and I
8 haven't had a chance to address it. We did know Mr. Harvey's
9 opinions a year before, but we only knew for the very first
10 time that they were going to call Mr. Harvey in their
11 case-in-chief when they put him on as a -- their witness list a
12 month before.

13 We always understood that he was only a rebuttal
14 witness. Even his own report said he was a rebuttal witness.
15 So I just want to clarify.

16 THE COURT: I appreciate that. All right, all right.

17 MR. CHARNOFF: Your Honor, just again a few seconds.

18 THE COURT: Yeah.

19 MR. CHARNOFF: Consistent with Mr. Urban's comment,
20 which I adopt, to be clear, this issue came up in the motion in
21 limine stage. The plaintiff keeps saying that we've known
22 about it for 14 months.

23 The plaintiff had that entire time to file a motion
24 with this Court seeking leave to untimely designate someone for
25 their case-in-chief. They never did it.

1 THE COURT: All right. Then there's a problem in the
2 case. There's a problem in the record. I've made my judgment
3 call, and we'll go after --

4 MR. CHARNOFF: Thank you, Judge.

5 THE COURT: We told them to be back at two?

6 THE COURT SECURITY OFFICER: Yes, ma'am.

7 THE COURT: All right. So you'll have a shortened
8 lunch break. Two o'clock.

9 Oh, but while you're doing that, just to give you
10 something more to think about at lunch, I've been going through
11 the jury instructions. I think the charging conference is
12 going to take some time, but the one thing is I am striking
13 from the jury instructions the tampering with witnesses. I
14 don't find there's sufficient evidence for that.

15 MR. CALHOUN: We have no objection, Your Honor.

16 THE COURT: All right. So just so you-all know, I've
17 taken those instructions out of the package.

18 All right, we'll recess until two.

19 (Recess from 1:12 p.m., until 2:00 p.m.)
20
21
22
23
24
25

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1 A F T E R N O O N S E S S I O N

2 (Jury present.)

3 THE COURT: All right, Mr. Calhoun?

4 MR. CALHOUN: Your Honor, plaintiff would call Philip
5 Harvey.

6 THE COURT: All right, Mr. Harvey.

7 PHILIP J. HARVEY, PLAINTIFF'S WITNESS, AFFIRMED

8 DIRECT EXAMINATION

9 BY MR. CALHOUN:

10 Q. Good afternoon, Mr. Harvey. Mr. Harvey, were you retained
11 as an expert in this case?

12 A. Yes.

13 Q. Can you explain to the Court your educational background?

14 A. Yeah. I graduated from Purdue University in 1975, and I
15 graduated from Harvard Law School in 1978, and I've been
16 practicing law -- I've been licensed somewhere since December
17 of 1978. So that's 42 years plus.

18 Q. And, Mr. Harvey, have you ever been qualified to testify
19 as an expert on attorneys' fees?

20 A. I have submitted a series of affidavits in cases about
21 attorneys' fees which have been relied upon by judges. I think
22 this is the first time I have ever testified live about
23 attorneys' fees.

24 Q. Approximately how many cases have you offered affidavits
25 concerning attorneys' fees?

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1 A. Oh, probably half a dozen.

2 Q. Can you take a look at Exhibit 911, please?

3 THE COURT SECURITY OFFICER: What volume?

4 MR. CALHOUN: 911 is in 15.

5 THE WITNESS: 911?

6 MR. CALHOUN: Correct, 911.

7 THE WITNESS: Yes, I have it.

8 BY MR. CALHOUN:

9 Q. All right. Do you recognize that as a copy of your CV?

10 A. Yes, I do.

11 MR. CALHOUN: Your Honor, we'd move 911 into
12 evidence.

13 THE COURT: Any objection?

14 (No response.)

15 THE COURT: No objection heard, it's in.

16 (Plaintiff's Exhibit No. 911 was received in
17 evidence.)

18 MR. CALHOUN: All right. And we would request the
19 Court recognize Mr. Harvey as an expert on attorneys' fees.

20 THE COURT: Is there any objection to that?

21 Mr. Charnoff, did you want to voir dire?

22 MR. CHARNOFF: Yes, Your Honor.

23 THE COURT: Go ahead.

24 VOIR DIRE EXAMINATION

25 BY MR. CHARNOFF:

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1 Q. Good afternoon, Mr. Harvey.

2 A. Good afternoon.

3 Q. Would you please tell us in what jurisdictions you're
4 currently licensed to practice law?

5 A. Virginia and the District of Columbia.

6 Q. Okay. So is it a true statement that you are not licensed
7 in any of the other 49 states?

8 A. Yes.

9 MR. CHARNOFF: I have no further questions. Thank
10 you, Your Honor.

11 THE COURT: All right, thank you.

12 Mr. Urban, any questions?

13 VOIR DIRE EXAMINATION

14 BY MR. URBAN:

15 Q. Mr. Harvey, my name is Tom Urban. I represent the Lohman
16 defendants.

17 You were designated by Navient to rebut the opinions
18 of Wayne Travell, correct?

19 A. That's my understanding, yes.

20 Q. Okay. And you were not designated to testify in Navient's
21 case-in-chief, correct?

22 A. That's my understanding. Subject to whatever rulings the
23 Court's made of which I'm not aware.

24 Q. Okay. But you were -- you understand that you were
25 designated as a rebuttal witness, correct?

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1 A. Yes.

2 MR. URBAN: No further questions.

3 END OF VOIR DIRE EXAMINATION

4 THE COURT: All right. Mr. Calhoun?

5 MR. CALHOUN: We renew our motion to -- or request to
6 be recognized as an expert on the issue of attorneys' fees,
7 Your Honor.

8 THE COURT: I'm going to permit that, yes.

9 DIRECT EXAMINATION (Cont'd.)

10 BY MR. CALHOUN:

11 Q. Mr. Harvey, did you review the report of Mr. Travell?

12 A. I did.

13 Q. All right. And did you observe his testimony here today?

14 A. I did.

15 Q. All right. And did you -- do you have any understanding
16 concerning -- are you aware of Mr. Travell's testimony in
17 pending concerning the requirement of the use of rates from
18 every jurisdiction in which an arbitration took place?

19 A. Yeah, as I understood his testimony, it was that absent
20 evidence of prevailing rates in each of the localities where
21 the underlying actions or arbitrations were pending, it's
22 impossible to determine whether the rates and the fees charged
23 were reasonable or not.

24 Q. All right. Do you agree with that opinion?

25 A. No.

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1 MR. CHARNOFF: Objection, Your Honor. That is a
2 matter of law. It's a pure conclusion of law.

3 THE COURT: He's an expert. I'm going to allow him
4 to give his view as to whether or not that particular opinion
5 is reasonable. We have a conflict of the experts. The jury
6 will sort that out.

7 MR. CHARNOFF: I understand.

8 I'll be very brief. I did not introduce any
9 testimony, I don't believe the other defendants did, and to be
10 very clear, I'm objecting to offering conclusions of law, which
11 there was no inverse or converse objection that I heard.

12 THE COURT: All right. It's overruled.

13 MR. CHARNOFF: Thank you.

14 BY MR. CALHOUN:

15 Q. All right. Did you agree with Mr. Harvey's opinion --
16 excuse me, Mr. Travell's opinion?

17 A. No, I did not.

18 Q. All right. And can you explain why not?

19 A. Sure. Part of the analysis of whether legal fees charged
20 in a lawsuit are reasonable is based on a determination of the
21 number of hours billed by the attorneys or other timekeepers,
22 like legal assistants, and the hourly rates they charge,
23 because a lot of lawyers bill by the hour. Some bill on a
24 contingency, some take flat fees, but for purposes of analysis
25 of reasonable attorneys' fees in this case, we're looking at

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1 hourly charges.

2 The -- you have to assess the actual hours worked and
3 then the reasonable rate to be charged. To determine that, the
4 first thing you do is you look at the actual rate that was
5 charged, and then you have to figure out whether that's
6 reasonable.

7 There are a number of factors to determine whether
8 rates are reasonable. One of them and the one that's used, I
9 think, predominantly is to look at prevailing rates in the
10 locality where the case is pending. Rates in Peoria, Illinois,
11 are less than rates in Manhattan, New York.

12 But that's not the only consideration. Sometimes you
13 have to look at the subject matter of the cases. In very
14 technical cases, such as a complex patent case, the hourly
15 rates for lawyers is a higher rate and a reasonably higher rate
16 than it would be for, say, a much simpler traffic accident
17 case.

18 And in this case particularly, there were initially,
19 I think, some 80 or 85 -- 83 underlying actions, arbitrations,
20 lawsuits; and in that case, litigants like Navient frequently
21 will retain and hire a national counsel to oversee the cases
22 because if you don't, every time you end up in a new town or a
23 new city or a new court, you've got to go find a new lawyer,
24 and you've got to go explain what the cases are about and go
25 through the technical law and the Telephone Communications

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1 Privacy Act and all that stuff and what's a dialer; and so
2 companies, litigants -- frequent litigants find it --
3 frequently find it cheaper and reasonable to hire one person, a
4 man or a woman, to be the overall architect of the cases, the
5 quarterback for everything; and then that person will
6 frequently go try individual cases that need to be tried or
7 oversee the litigation everywhere.

8 And so when something like that happens, I don't
9 think it's necessary to find, say, the local rate in, you know,
10 Brooklyn and the local rate in Topeka and the local rate in
11 Fresno and the local rates in Baton Rouge. You find one lawyer
12 you like who's good who can do it, and you hire them, and then
13 you start looking at that lawyer's rate and assess whether that
14 in that context is reasonable.

15 In this case, this man was Dennis Lueck, I think it's
16 pronounced, L-u-e-c-k, and he was with one firm, Akerman
17 Senterfitt, that has, I think it's got 23 offices around the
18 world, and then with the Hinshaw Culbertson firm, which has got
19 a dozen offices throughout the country, and his hourly rate is
20 305 bucks an hour.

21 He was a partner -- a graduate of law school in 2006.
22 That's a good rate for somebody who's a 2006 graduate and a
23 partner. I mean, that's a deal. And they hired him to oversee
24 these cases, with generally people of lesser hourly rates,
25 associates, younger colleagues, to help him, with the stray

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1 bill by, you know, some senior guy who's got to weigh in for 20
2 minutes to just opine about wisdom and age, but that's not
3 really particularly pertinent.

4 And so he goes into all those cases, and I think
5 under those circumstances, the reasonable analysis, it would be
6 wrong to confine it to, you know, prove to me that the local
7 rate in Topeka was what you charged, as opposed to the rates
8 for this national firm you picked to oversee all the
9 litigation, was that a reasonable thing to do.

10 When you try to assess the reasonable rate, you don't
11 have to get the cheapest lawyer because there's always a
12 cheaper lawyer. You've got to find a reasonable rate and a
13 reasonable lawyer, and I think with Dennis Lueck at 305 bucks
14 an hour, that is reasonable everywhere.

15 Q. What rate are you charging for your work in connection
16 with this work?

17 A. I'm charging \$500 an hour.

18 Q. All right. And I believe you said you've practiced for
19 40-something years?

20 A. Yes, since 1978.

21 Q. And in your experience, would \$305 be a reasonable rate
22 for a national counsel?

23 A. Yes.

24 MR. CHARNOFF: Objection, Your Honor. Scope of the
25 question, foundation.

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1 THE COURT: Objection overruled.

2 BY MR. CALHOUN:

3 Q. All right. And did you also hear Mr. Travell opine
4 concerning whether he could determine whether the fees are
5 reasonable from reviewing the invoices?

6 A. Yes.

7 MR. URBAN: Objection, Your Honor. That
8 mischaracterizes Mr. Travell's testimony.

9 THE COURT: He said he could not make a
10 determination.

11 MR. URBAN: Oh, I'm sorry, I misheard the question.

12 THE COURT: That's what I thought you said.

13 THE WITNESS: Yeah.

14 THE COURT: Yeah.

15 MR. URBAN: Okay. I thought he said the opposite.

16 BY MR. CALHOUN:

17 Q. Did you, did you also review the invoices?

18 A. Yes.

19 Q. Did you experience -- in your review of those invoices,
20 did you encounter any impediments from determining whether or
21 not the billing entries were appropriately done?

22 A. No.

23 Q. Did you find anything else that would prevent someone from
24 determining whether those rates were reasonable -- or the
25 entries were reasonable?

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1 A. No. I mean, you look at the entries, and there are some
2 redactions, because there are always redactions. When lawyers
3 fill out their time sheets, you can say, you know, "trial," and
4 put eight hours for today. Sometimes you say "conference with
5 client re," you know, "a suit tie to wear at trial." Those are
6 innocuous.

7 But if you have an entry that says "discuss with
8 client reason fingerprints on murder weapon," that's not
9 something you want to disclose to anybody else. So when you
10 take that and you apply for attorneys' fees, you block out.
11 You say "conference with client re," and you take out
12 the "fingerprints on murder weapon" part, because you don't
13 want to disclose attorney-client privileged communications.

14 You also don't want to disclose any confidential
15 information that you don't otherwise need to disclose in the
16 case, and you don't want to disclose the mental impressions and
17 conclusions and theories of counsel any more than you have to.
18 Those are all protected in various ways. And so you redact
19 them.

20 Now, some people will redact just whole pages, and
21 that's kind of useless then. You really can't figure out. But
22 when you redact, you know, half a line or a line and a half, I
23 don't think that's, frankly, an impediment at all. It wasn't
24 to me looking at the bills, looking at the lines.

25 And based on Mr. Travell's report, if I could talk

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1 about his report --

2 MR. URBAN: Objection, Your Honor. The limitation is
3 what he testified in the trial, not his report.

4 THE COURT: That's how we're going to do it today,
5 yes.

6 MR. CALHOUN: Yeah.

7 THE COURT: You can stop at that, Mr. Harvey.

8 THE WITNESS: Yes.

9 BY MR. CALHOUN:

10 Q. So from your review of those redactions and invoices,
11 could you conclude that those invoices are reasonable?

12 A. Yes.

13 MR. CALHOUN: No further questions.

14 THE COURT: All right. Is there any recross?
15 Mr. Charnoff, do you want to recross -- I'm sorry, to cross?

16 MR. CHARNOFF: We don't have any cross.

17 THE COURT: All right, that's fine. You have no
18 questions.

19 MR. CHARNOFF: Just very briefly.

20 CROSS-EXAMINATION

21 BY MR. CHARNOFF:

22 Q. Mr. Harvey, you've served as an expert witness at least
23 half a dozen times although you didn't testify live in court;
24 am I correct?

25 A. It's in my CV. I've been retained as an expert it looks

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1 like about a dozen times, and testimony in court, you know, I
2 think this is maybe the second or third, because most of the
3 cases are resolved either by the court or they're settled
4 first.

5 Q. Okay. And in your experience, have you been designated
6 both to support a fee award and to also critique and oppose a
7 fee award?

8 A. Yes.

9 Q. Okay. Are you familiar with the case law involving
10 redactions and block billing?

11 A. I'm familiar with case law. I'm not sure that I'm
12 familiar with whatever case law you're talking about.

13 Q. Fair enough.

14 A. But I have seen case law that criticizes block billing,
15 sure.

16 THE COURT: All right. Now, let's explain "block
17 billing." The jury will not know what that term means.

18 THE WITNESS: Okay. Block billing. When you work in
19 a day, you do a bunch of different things. You have, like, you
20 know, telephone call with opposing counsel, .2; or draft
21 interrogatories to defendant, .4; or, you know, meeting with
22 client re deposition, .6; or testimony of -- testimony at
23 trial, 2.4.

24 Those are pretty good, and the -- pretty good billing
25 discipline in the invoices or computer-generated things, or

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1 whatever that stack was I looked at.

2 Sometimes lawyers get lazy, frankly, and they will
3 say, you know, work on case, 7.2 hours. Well, you can't figure
4 out what they did.

5 And there's a tension between how much time lawyers
6 want to spend on filling out their time sheets, how much time
7 clients want the lawyers to spend and charge them filling out
8 time sheets, and then when you get to court and you want to
9 apply for fees, the court or the jury, the trier of fact
10 looking at it will say, well, 7.2 hours, I don't know what you
11 did.

12 You could have been extremely busy. That all could
13 be completely legitimate, or it could be, you know, part
14 good/part bad. You can't tell.

15 So if you get a block, a big block of time with a
16 description with a big number after it, that's block billing,
17 and some judges have criticized it to some degree. It depends
18 on the amount of the block billing and how bad it is, and with
19 human behavior, there are sort of infinite gradations of
20 offenses on block billing.

21 BY MR. CHARNOFF:

22 Q. Thank you, Mr. Harvey.

23 And to the extent you're familiar with case law and
24 especially where judges as opposed to juries are making
25 determination as to reasonableness of attorneys' fees, do you

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1 agree with me that courts have regularly significantly
2 discounted both redacted invoices and block billing invoices,
3 correct?

4 A. No, I don't think I'd agree with you that courts regularly
5 significantly discount it. I mean, there are discounts for
6 block billing, and there are discounts for redactions if
7 they're ridiculous, but, I mean, I've submitted redacted
8 attorneys' fees bills and had the court approve them without
9 blinking an eye as a litigant, not as an expert. It's just --
10 it's a rule of reason. It's a rule of reasonableness.

11 Q. Do you agree with me that many litigants will simply
12 choose not to seek fees for any entries that are redacted to
13 avoid exactly this dispute?

14 A. You know, that happens sometimes because what can be the
15 case in cases in which a jury doesn't decide the reasonableness
16 of attorneys' fees but the court does, the court can without a
17 waiver of the attorney-client privilege look at the unredacted
18 bill. The court could ask, let me see the whole thing.

19 And there's sometimes something in those bills that
20 you don't even want the judge to see. So sometimes people
21 forego asking for fees if there's something in there that's,
22 you know, like, you know, conference with client re
23 fingerprints on murder weapon. That's not something you want
24 to send to the judge, no matter what.

25 But yeah, I mean, that happens, sure. I mean, it's

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1 again, there are, there are thousands of cases tried every year
2 and probably millions over my career in various places, and I'm
3 sure somebody somewhere has said, I'm not going to go seek
4 attorneys' fees, or I'm going to cut out the redactions because
5 I don't want to have the fight we're having right here.

6 Q. Fair enough, Mr. Harvey.

7 Do you agree with me that I think the universe of
8 original claims that you just looked at were 83? Does that
9 sound right?

10 A. I think there were 83 total, yes.

11 Q. Okay. Do you agree with respect to that universe of 83
12 cases, that that involved cases that were litigated or
13 arbitrated in almost two dozen states?

14 A. I think that's right, yes.

15 Q. And were you present in the courtroom during Mr. Travell's
16 testimony?

17 A. I was.

18 Q. Okay. And did you hear him testify that to the best of
19 his recollection, none of that universe of 83 cases was
20 anything litigated in Virginia, D.C., or Maryland?

21 A. Yes.

22 Q. Okay. And do you agree with that?

23 A. I, I have no reason to disagree with it. I haven't looked
24 through that stack -- it's, like, about this -- recently enough
25 to be able to confirm that there is nothing in D.C. or

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1 Virginia, where I'm, where I'm admitted to the bar, which I
2 guess is the point of your question, but if Wayne Travell says
3 there's nothing in there that's from Maryland, D.C., or
4 Virginia, he's a straight shooter. Unless he made a mistake,
5 he's right, I'm sure.

6 Q. Okay. Mr. Harvey, I thought I heard you use the
7 expression, perhaps you're responding to the way it was phrased
8 by plaintiff's counsel, but I thought you used the
9 expression "national rate" when you were testifying earlier.
10 Do you agree with me, consistent with your other testimony,
11 that there are market rates in various markets of the United
12 States based on state population and area of the states, such
13 as a big city versus a rural area?

14 A. If you're talking about geographic markets, sure.

15 Q. Okay.

16 A. There are different kinds of markets.

17 Q. Exactly. Do you agree with me that by definition, because
18 rates vary by geographic market and whether you're in federal
19 court or state court, in a big city or a rural area, that there
20 is no such thing as a national rate?

21 A. Oh, no, I think that there is for -- for, you know,
22 enormous bankruptcy cases, for very large patent cases, there
23 are national rates, and I think what I was trying -- the point
24 I was trying to get across was that in this case, you pick a
25 national counsel who has the rate that he charges or she

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1 charges, and if that rate is reasonable, even if not the lowest
2 rate available in Topeka, Kansas, and Missoula, Montana, that
3 that's still -- the market is a market for people who are
4 capable of managing or quarterbacking 83 of these TCPA cases,
5 and that's the market of lawyers. It's not geographic. It's
6 sort of by subject matter, talent, ability, and, you know,
7 staffing. You've got the manpower. You've got the oomph to do
8 it.

9 Yeah, then I think that the rate applied nation- --
10 you know, a \$305 rate applied nationwide is reasonable.

11 Q. Do you agree with me that even a large firm that has
12 multiple offices across the United States, they charge
13 different rates based on what city they're in? Manhattan rates
14 are different from Peoria rates?

15 A. Yes, that's frequently the case.

16 Q. Even within the same firm?

17 A. Yes, that's frequently the case.

18 Q. And that's true for partners, and that's true for
19 associates?

20 A. Yes.

21 MR. CHARNOFF: No further questions. Thank you, Your
22 Honor.

23 THE COURT: All right. Mr. Urban, do you have any
24 questions?

25 MR. URBAN: Yes, ma'am.

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1 CROSS-EXAMINATION

2 BY MR. URBAN:

3 Q. Hello again, Mr. Harvey.

4 A. Hello.

5 Q. Dennis Lueck practices in Los Angeles, correct?

6 A. I don't know.

7 Q. You don't?

8 A. I Googled him and couldn't find him, so I don't know where
9 he's practicing at the moment.

10 Q. Okay. Assuming that Dennis Lueck practices in Los
11 Angeles -- and the jury can remember where they saw letters
12 from -- isn't that one of the higher-priced jurisdictions in
13 the country?

14 A. Probably, yeah.

15 Q. Okay. And an attorney who practices in Los Angeles like
16 Dennis Lueck could charge different rates, depending on which
17 jurisdiction a case was pending, correct?

18 A. Well, yeah. A lawyer can charge different -- I mean,
19 whatever he and the client agree upon, he can charge or she can
20 charge, sure.

21 Q. Okay. Now, did you review the Navient summaries -- well,
22 let me back up. You understand the invoices that have been
23 produced in this case were not actual invoices that probably
24 you prepare for your clients, correct?

25 MR. CALHOUN: Objection.

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1 THE COURT: What's the basis for the objection?

2 MR. CALHOUN: I think he's mischaracterizing what has
3 been introduced.

4 MR. URBAN: We've already had testimony that they're
5 summaries.

6 THE COURT: Yeah. I mean, they have the
7 title "Invoice" on them, but they're not the traditional
8 invoice of a letterhead letter from the law firm directly to
9 the client. They're done -- they're submitted in a different
10 way. But ask your question.

11 THE WITNESS: What I understand is that Navient has
12 this uplink system.

13 BY MR. URBAN:

14 Q. All right. That was my question, sir. Their summaries
15 are not the kinds of invoices that you send to your clients,
16 correct?

17 A. Oh, they're pretty close.

18 Q. Don't you prepare an actual invoice that's prepared by
19 your firm and mailed to the client?

20 A. Yes.

21 Q. Okay. And you don't upload that to some website somewhere
22 and then allow the client to make changes to it, correct?

23 A. I have on occasion had a client who had a system where I
24 would enter my time into their system.

25 Q. But generally, that's not how you do it?

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1 A. No.

2 Q. Okay.

3 A. I practice law in Alexandria. I send out paper bills.

4 Sometimes I e-mail them if I'm feeling, you know --

5 Q. I'm in Arlington. Same thing.

6 Do you review the -- did you review the Navient

7 summaries to see if the amount of time spent on specific

8 motions were reasonable?

9 A. No.

10 Q. Okay. So you don't specifically know how many hours

11 Dennis Lueck's firm spent on pre-arbitration briefs for Indra

12 Hernandez, correct?

13 A. Oh, no. I couldn't -- I mean, I could find it in the

14 sheets, but I didn't look for it, and I can't sit here off the

15 top of my head and tell you.

16 Q. Okay. And not for Jennifer Anicete either?

17 A. Who?

18 Q. Jennifer Anicete.

19 A. No.

20 Q. You don't even remember that name?

21 A. I vaguely remember the name, but, I mean, literally the

22 stack was like this high, and I looked through it. A year ago

23 I read it, and then I glanced at it again, but mostly I glanced

24 at it to offer the opinions I have. I didn't really need, I

25 didn't think, to digest and remember every line item in all the

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1 bills.

2 Q. Well, I'm not asking -- but did you actually review to
3 make sure that they didn't spend 40 hours on a motion for a
4 pre-arbitration brief?

5 A. Yes. I looked at it that closely.

6 Q. But you don't remember any of those?

7 A. I do not. Not sitting here today, no.

8 Q. So how can you today opine that they're reasonable if you
9 can't even remember how much time was spent on these various
10 pre-arbitration briefs?

11 A. Well, the thrust of my opinion is about the rates and the
12 hours, and if you look at the rates and the hours and the
13 totals for each of the cases, I think it was a reasonable
14 number. The, the amount of legal fees spent on each case was
15 about \$70,000.

16 It's all in my report. I can't regurgitate the
17 numbers off the top of my head, but that's the basis for the
18 reasonableness.

19 Whether somebody spent too much time on a motion in
20 Case X or Case Y, I don't know. Navient actually paid these
21 bills, and somebody in Navient who was reasonably sophisticated
22 was looking at the bills and making comments about them, which
23 is a factor you take into account when you're looking at
24 reasonableness.

25 Q. Are you aware that Navient as early as mid-2018 knew that

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1 they were going to bring a RICO case against Jeff Lohman?

2 A. No, I didn't know that.

3 Q. Okay. Well, if Navient knew that they were going to bring
4 a RICO case against Jeff Lohman, wouldn't they have an
5 incentive to increase the amount of attorneys' fees that they
6 would be suing Mr. Lohman for?

7 A. No.

8 Q. Why not?

9 A. Well, because you pay the money out now, and you hope to
10 get it back later? I'd rather pay less now and get less later.

11 Q. Okay. But if you really believe that you're going to get
12 it back later, you're really not as worried as if you didn't
13 think you were ever going to recover it, correct?

14 A. If you're asking me what I would think in Navient's shoes,
15 the answer is no. I wouldn't think like that at all.

16 Q. Okay. But you can't speak to the reasonableness of any
17 specific motions or anything that were done in any of the
18 cases, correct?

19 A. I was not retained to do that, no.

20 MR. URBAN: Okay. No further questions, Your Honor.

21 THE COURT: All right. Any redirect?

22 MR. CALHOUN: Just very briefly.

23 REDIRECT EXAMINATION

24 BY MR. CALHOUN:

25 Q. Mr. Charnoff asked you if you're aware of case law on

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1 block billing and things like that. Did you see any of that in
2 the Navient invoices?

3 A. You know, it really didn't look like any that I can recall
4 as I sit here today. I thought the billing discipline was
5 pretty good. I mean, it wasn't a big, you know, lump of
6 amorphous time that they just slid through.

7 When you're uploading it to the client system, you
8 tend to be a little more careful. I thought it was pretty good
9 bills.

10 Q. And you saw -- did you see any evidence that Navient
11 stopped reviewing the bills after any point in time and stopped
12 making reductions or comments in those bills?

13 A. No.

14 MR. CALHOUN: No further questions.

15 THE COURT: Any recross? No?

16 MR. CHARNOFF: No from GST, Your Honor.

17 THE COURT: Mr. Urban?

18 MR. URBAN: Not for the Lohman defendants.

19 THE COURT: All right. Mr. Harvey, thank you for
20 your testimony. You're free to go.

21 THE WITNESS: You're welcome. Am I free to go or
22 subject to recall?

23 THE COURT: No, no subject to recall. You're free to
24 go.

25 THE WITNESS: Thank you.

1 THE COURT: Thank you.

2 (Witness excused.)

3 THE COURT: All right. Mr. Calhoun, is there any
4 other evidence that the plaintiff wants to put on?

5 MR. CALHOUN: No, Your Honor. We would make a Rule
6 50 motion, but I think that's -- probably should be later.

7 THE COURT: All right, we can do that later. All
8 right.

9 I'm going to ask the jurors to just step out for a
10 minute into the jury room. I don't think we need to even send
11 you across the hall. Just keep your masks on if you're going
12 to chat with each other, all right? Just keep a little
13 distance if you can.

14 So we're going to take a five-minute recess for the
15 jury. I want to talk to counsel for a second.

16 (Jury out.)

17 THE COURT: All right. Since I don't want to waste
18 the jury's -- have a seat, please. I don't want waste the
19 jury's time, and we're all getting paid to be here, so I can
20 waste your time.

21 My plan is to release the jury for today because
22 making sure that we've gone through the jury charge, the
23 verdict forms, we need to do some work on both, and to take
24 care of any housekeeping matters, make sure that we've cleaned
25 up everything, will take a good chunk of the afternoon, and I

1 want to do it right.

2 I'm planning -- here's what I'm planning to do.
3 We're going to stay in court this afternoon, and we're going to
4 work through the jury instructions.

5 I am then going to have my law clerk type up a clean
6 set. I mean, obviously, they need editing. We have to, among
7 other things, get Mr. Branch's name out of the instructions,
8 because it's one of the names throughout them. The verdict
9 forms have to be changed. So there's stuff that has to be
10 done. That's why we have you submit them in Word so that we
11 can work with them.

12 I also have some of my standard instructions that I
13 think totally capture what you have, but I'm more comfortable
14 with them, and they've been through the Fourth Circuit a
15 million times, so I know that they fly.

16 My practice is always to send to counsel ahead of
17 time the final written package of instructions. I then give
18 you time to look at them one last time, catch any typos,
19 because my practice is I orally instruct and then I give them a
20 written copy of the instructions, so if there's a typo or
21 something, I put the burden on you-all to make sure you've
22 caught it.

23 So my plan would be to tell the jury to go home
24 tonight, take a good break, say, you know, I got you-all to
25 move the case quickly, so we've cut back on time, warn them

1 again not to start any deliberation, and have them come back
2 in, I want to say probably ten o'clock Monday morning.

3 At that point, what I will have done ahead of time is
4 you'll have the instructions sometime tonight. You've got the
5 whole weekend to go back over them.

6 I'll have -- ask you to first of all e-mail us any
7 objections you have to that charge, and that e-mail has got to
8 get to my chambers by 7:30 Monday morning. We will fine-tune
9 any issues, if any, that have come up.

10 You should plan to be here at 9:30 so that if we have
11 to argue anything, we have time, and then at ten o'clock, the
12 jury would be here, and we will have closing arguments, and
13 then I will instruct the jury, which means they will get the
14 jury -- the jury will get the case to deliberate starting
15 Monday.

16 Does anyone have a problem with that schedule?

17 MR. CHARNOFF: On behalf of GST, I just have a
18 question.

19 THE COURT: Sure.

20 MR. CHARNOFF: Which is -- and I know different
21 judges do it differently. Do you instruct before we --

22 THE COURT: I instruct last. The last they hear is
23 from me, but because you have the written instructions ahead of
24 time --

25 MR. CHARNOFF: Okay.

1 THE COURT: -- lawyers like to be able to argue from
2 the mouth of the Court, yes.

3 That's why we do it that way.

4 MR. CHARNOFF: Thank you, Judge.

5 THE COURT: Okay? Mr. Calhoun?

6 MR. CALHOUN: He took my question, but I was just
7 wondering if you had any time limits on closing for purposes of
8 our plan.

9 THE COURT: I'm going to let you do that. So
10 everyone is agreeable we let the jury go today and have them
11 come back at ten tomorrow morning -- Monday morning? Yes, I'm
12 not coming in on Saturday.

13 MR. CHARNOFF: (Nodding head.)

14 MR. CALHOUN: Yes, Judge.

15 THE COURT: All right, let's bring the jury back in.

16 THE COURT SECURITY OFFICER: Yes, ma'am.

17 (Jury present.)

18 THE COURT: All right, folks. The good news is all
19 the evidence is in now. The even better news is that means I
20 can let you go home for today, because it's going to take us
21 some time to, number one, get all of the exhibits organized,
22 the ones that have been admitted, so that they'll be available
23 for you on Monday; and number two, the lawyers -- you-all can
24 have a seat -- the lawyers are going to need to work with me on
25 making sure that the jury instructions are as clear as they can

1 possibly be. There are some complex legal issues in this case.
2 We're going to try to make it as easy for you as possible.

3 So again, it's extremely important that you not try
4 to think about this case -- really, I recommend just get it out
5 of your minds. You'll get plenty of refreshment about the case
6 on Monday. Continue to abide by my cautions.

7 But obviously, all the lawyers should be commended
8 because we tailored this case -- remember I told you-all it was
9 probably going to take two weeks. I mean, it may take you a
10 couple of days next week, but you will be getting this case for
11 deliberation on Monday.

12 I'm going to have you come back at ten o'clock on
13 Monday just to make sure, again, I don't want to waste your
14 time, and you've been so good about being here on time, and at
15 ten o'clock, what you can be expecting is the closing arguments
16 of counsel. So the lawyers are going to again directly address
17 you to talk about the case that you've heard and to urge you to
18 reach certain conclusions about the case, and then after the
19 lawyers have made their arguments to you, I'm going to give you
20 the legal instructions.

21 So it's -- I'm not sure if we'll finish all that
22 quite by the lunch hour, but certainly by very early afternoon
23 Monday, you will get the case.

24 And just so you know because I want you to feel
25 comfortable, and I know we've had to split you up, but we are

1 going to have you do your deliberation downstairs on the third
2 floor in our very large -- some of you may have been down there
3 in the jury deliberation room for your lunch breaks. We're
4 going to make sure the tables are set up so that you can, you
5 know, have plenty of distance, have your water, and, frankly,
6 I'll let you bring coffee and food in there as well, and you'll
7 have the exhibits and be able to work on the case down there,
8 all right?

9 So that is the plan. Again, I want to thank you for
10 having been such a great jury this week, and we'll be looking
11 forward to seeing you on Monday. But you-all can just leave
12 your stuff, you know, as you've been doing.

13 Is that going to work for everybody, ten o'clock on
14 Monday?

15 (Jurors nodding heads.)

16 THE COURT: Great. Then we'll see you then. Thank
17 you.

18 We'll stay in session.

19 (Jury out.)

20 THE COURT: All right. So I think the first -- we
21 have a couple of housekeeping matters, not the least of which
22 is the stipulation exhibit; I haven't forgotten that; but in
23 terms of time, Mr. Calhoun, let me hear what -- I always ask
24 lawyers -- I open it up. You tell me how much time you think
25 you want, and then I'll tell you how much I'm going to give

1 you. I always can judge the reasonableness of counsel by what
2 the request is.

3 MR. CALHOUN: Mr. Grell and I were joshing each other
4 a little while ago because yesterday when he said 15 minutes,
5 it took 30, which I think is all too typical of us lawyers.

6 I think that 30 minutes is a good target.

7 THE COURT: Now, you're the plaintiff.

8 MR. CALHOUN: I'd like longer, Your Honor.

9 THE COURT: You get -- well, you get a rebuttal.

10 MR. CALHOUN: Yeah, I know.

11 THE COURT: So, I mean, when you tell me 30 minutes,
12 that's 20 and 10? 15 and 15?

13 MR. CALHOUN: No, I was thinking 30 and 10.

14 THE COURT: Thirty and 10? That's what you want, 40?

15 MR. CALHOUN: I'd take an hour, but 30 and 10 -- it's
16 going to get too long if I do that, so 30 and 10.

17 THE COURT: Well, it's funny, I have never in all the
18 years I've been on the bench seen an effective closing argument
19 that went that long. I mean, I think it puts the jurors to
20 sleep.

21 MR. CALHOUN: That's why I --

22 THE COURT: All right, 30 and 10 for the plaintiff.

23 Mr. Grell?

24 MR. GRELL: Well, unlike yesterday, I will rehearse.
25 Even with my bad voice, I think my opening was 20. So I will

1 get it in with whatever period you give us. If they get 40,
2 we'd obviously want 40. But hopefully we would use less than
3 that.

4 THE COURT: All right. I'll give you -- I think it's
5 fair in this case to give each side 40, all right? And I
6 actually, because there are two defendants -- and I suspect
7 Mr. Charnoff will not take 40, but if you think --

8 MR. CHARNOFF: Your Honor suspects correctly.

9 THE COURT: All right, that's great.

10 But that's the max, all right? So 40 and 40 and 40,
11 that's two hours, right? So that would be, assuming we start
12 on time Monday at ten, that would probably be the morning.

13 What I might do then is do the -- well, we can split
14 up the instructions probably. It would make it easier for the
15 jury. Because the instructions, I think, are going to take an
16 hour to an hour and a half. But that means the jury gets the
17 case relatively early Monday afternoon, assuming we don't go
18 over Monday morning, which I hope we don't do. All right, so
19 that's that.

20 I'm going to have Ms. Guyton go through the exhibits.
21 So only the exhibits that have been admitted are going to go
22 into evidence -- go into the jury room. And it's my practice
23 to send the, the exhibits with the jury. They don't have to
24 ask to see specific exhibits.

25 MR. CHARNOFF: Your Honor, I don't mean to interrupt

1 your flow.

2 THE COURT: Yeah.

3 MR. CHARNOFF: I want to be clear that --

4 THE COURT: I know you have a good voice, but it
5 still should be at the lectern.

6 MR. CHARNOFF: Of course, Your Honor.

7 THE COURT: Yeah.

8 MR. CHARNOFF: Obviously, we're doing a lot of
9 housekeeping this afternoon. That's great. I'm looking
10 forward to all of that. I just want to be clear that, you
11 know, at some point, even however briefly, we'd like to renew
12 our Rule 50 motions.

13 THE COURT: I'm going to give you time for that too.

14 MR. CHARNOFF: Fair enough. Thank you, Judge.

15 THE COURT: Yeah. But the next issue that I think we
16 have to resolve is the stipulation. Have you been able to work
17 any more of that out?

18 MR. CALHOUN: Your Honor, we haven't had any time to
19 talk about that particular issue, no.

20 MR. CHARNOFF: Your Honor, on behalf of GST
21 defendants, there were a series of e-mails that went back and
22 forth last night, and when we addressed it very briefly this
23 morning, I believe you asked plaintiff's counsel to identify
24 what in particular in the stipulations they actually needed,
25 that they actually had foregone some witness testimony to have

1 in there, so that you could make a decision based on that.

2 So I have not heard that yet, but based on that, I'm
3 prepared to be reasonable.

4 THE COURT: Well, you've all been reasonable, you
5 know. Within the confines of what a good advocate can do, yes,
6 that's fine.

7 I mean, if you had 10 or 15 minutes, do you think you
8 could sort it out, or is it going to take longer than that?

9 MR. CALHOUN: Your Honor, unfortunately, everything
10 has taken longer than that, but I'm certainly willing to give
11 it a try. We have cut, I think it was 44 pages. It is now
12 down to 10-1/2. So, you know, we've done enormous amounts of
13 cutting.

14 There's not agreement on what goes in and out
15 entirely. So I certainly think it makes sense for us to take
16 ten minutes and try to talk it through.

17 THE COURT: All right. Mr. Grell?

18 MR. GRELL: Yes. I mean, some guidance would be
19 helpful --

20 THE COURT: All right.

21 MR. GRELL: -- because my issue is from my
22 perspective, it's what did you not -- what were you not able to
23 get in that you thought you otherwise would have gotten in
24 without the stipulation?

25 Everything that relates to my clients is in. I can't

1 see anything that isn't already in, and I just think it would
2 confuse the jury.

3 So if you, if you could give us clear guidance on
4 that issue, if it's already in, then it's not in the
5 stipulation, is that correct, or are we going to be redundant
6 and stuff like that?

7 THE COURT: The bigger concern I had about the
8 stipulation was what you-all properly brought to my attention,
9 which is that there were certain agreed-to facts for purposes
10 of summary judgment that are now inconsistent with the evidence
11 that's in the record. That would be a problem, and that should
12 come out of the stipulation --

13 MR. GRELL: And with my clients --

14 THE COURT: -- clearly.

15 MR. GRELL: -- I don't think we -- we got rid of all
16 of the individual -- we were going to do a chart, we were going
17 to do all this stuff. We just said, forget it, we don't need
18 it.

19 So -- actually, Mr. Calhoun takes credit for reducing
20 the size of this. I should get most of the credit because it
21 was, like, 300 paragraphs of mine.

22 MR. CALHOUN: We did the chart.

23 MR. GRELL: You did the chart.

24 So we come to that. And we're not even going to use
25 any of those facts. But I literally, I'm not -- I just don't

1 see -- there's -- we're not even arguing the facts that are in
2 there, so I think it's mostly with the GST people. I don't
3 know anything about the GST folks --

4 THE COURT: All right.

5 MR. GRELL: -- but I think they cut more of their
6 case to save on deposition reading but not ours.

7 MR. CHARNOFF: Just very briefly, Your Honor, to
8 follow Mr. Grell's point on behalf of GST, much of what is in
9 here at this point is cumulative. For example, you know,
10 paragraph what's now 64, 69, it's all items about Mr. Mize, who
11 he already testified for two days, and it's just repeating
12 stuff that Mr. Mize said or did, and so I think it unfairly
13 reemphasizes or repeats things the jury has already heard
14 repeatedly.

15 THE COURT: That would be the problem that we have
16 here. So again, what I remember myself saying the other day
17 was, because I had ruled at the -- based upon what we did at
18 the earlier hearing and based upon Mr. Calhoun's representation
19 that the case could be shortened by introducing the
20 stipulations, but to the extent that the facts are already in
21 the record, there is no need and it could arguably be
22 inappropriate to put them in as stipulations because that's
23 almost like taking facts away from the jury, so to speak.

24 I mean, we wasted our time putting them in, and one
25 way or the other, it's a problem, but to the extent there are

1 facts in that stipulation for which the plaintiff chose not to
2 put on evidence, we don't need it because we've stipulated to
3 it, that, to be fair, should go in as a stipulation, but only
4 that.

5 MR. CHARNOFF: And I won't -- and I don't object to
6 that.

7 MR. CALHOUN: All right, Your Honor. Some of it you
8 need to hang -- there has to be some context or it's just, you
9 know, a random fact.

10 THE COURT: Well, no. I mean, it's just a random
11 fact. So I think the best thing is for you to circle the ones
12 that you feel should still be in, all right? And I'll need to
13 take -- we'll need to look at that, but I think -- I want to
14 give you a few minutes to work on that, yeah.

15 MR. GRELL: Another issue is that there's all this
16 information on people who are no longer parties, including just
17 a ton of people that are just, Jeremy Branch and -- I mean, we
18 list in there -- I have no problems saying they're employees of
19 the Lohman law firm, but there's all of these other defendants
20 and parties that have been dismissed, and it's just --

21 THE COURT: Well, it doesn't help the plaintiff's
22 case to get the jury confused.

23 MR. CALHOUN: No, I agree, Your Honor.

24 THE COURT: All right.

25 MR. CALHOUN: Most of them are out. Some of them are

1 in there for context, but understanding Your Honor's direction
2 here, rather than circle and hand up, let us take it back, cut
3 it down to a clean Word document, and e-mail it to you tonight
4 or tomorrow.

5 Would that -- I think that -- I mean, I'll obviously
6 share it with counsel first, but I think that makes more sense
7 than circling and trying to give it to you.

8 THE COURT: All right, that's fine. That's fine.
9 All right.

10 I think then the last thing is since, since you're
11 still here before I give you a little bit of a break, we don't
12 need a break quite yet, I'm looking at these verdict forms, and
13 I really -- well, actually, Mr. Calhoun, I want you back at the
14 lectern.

15 In terms of the structure of your case, I am really
16 concerned about juror confusion. Can you explain to me why you
17 have both Counts I and II in your complaint and how they
18 differ, how they differ?

19 MR. CALHOUN: Your Honor, we hammered through on how
20 they differ. Frankly, I think if we combined them, it wouldn't
21 make a material difference.

22 THE COURT: That's been my impression from the very
23 beginning. Do defense counsel have any objection to that?

24 MR. GRELL: Just having one 1962 claim?

25 THE COURT: One 1962 claim. Now, except, though, I

1 thought that with Count I, not all the defendants were in it.
2 Isn't GST only in Count II?

3 MR. CHARNOFF: Correct, Your Honor.

4 MR. CALHOUN: Correct.

5 MR. CHARNOFF: We're only in Counts II, III --

6 MR. CALHOUN: But if there's just one count, it
7 doesn't make a difference.

8 THE COURT: So why don't -- I mean, dismiss Count I
9 and just go with Count II.

10 MR. CALHOUN: I think --

11 MR. GRELL: No, no, no. Your Honor, I disagree with
12 that.

13 THE COURT: All right.

14 MR. GRELL: Again, this goes to the nature of the
15 conspiracy. They have to prove that someone violated 19- --
16 committed a substantive offense, and without a 1962(c) claim --

17 THE COURT: They're both, they're both -- both Counts
18 I and II are 1962(c) complaint counts.

19 MR. GRELL: No, they're not. Oh, this is the GST --
20 okay. I thought it was the conspiracy.

21 THE COURT: No, no. Conspiracy is, is (d).

22 MR. GRELL: Right, right.

23 THE COURT: No, I know the difference between (c) and
24 (d), but I couldn't tell the real difference between Counts I
25 and II other than GST is named as a party in Count II.

1 MR. GRELL: Okay.

2 THE COURT: So I could see -- I can tell you, our
3 juries are incredibly perceptive, and I used to do what Judge
4 Bryan did, and I would give the jury instructions orally in
5 court and tape them and then give them a cassette player that
6 they could play them if they didn't get them. That was
7 never -- then they'd still ask for the written ones.

8 The problem with the written instructions, I will
9 tell you this, is some of them read them like lawyers, and we
10 get brilliant questions, but it shows you how carefully they
11 look at stuff, and I was looking at those two counts and
12 thinking they're going to go crazy trying to figure out what's
13 the difference with Count I and Count II.

14 MR. CALHOUN: Your Honor, we had a basis for it.
15 Frankly, I was starting to work on my closing, and I had the
16 same thought. If we dismiss I and stick with II, I think
17 that's fine.

18 THE COURT: All right. So it's going to be Count II,
19 III, IV, and V. Four counts. Branch is out. Witness
20 tampering is out. So far, that will reduce some of the
21 instructions a bit, all right? And that again means I have to
22 redo these verdict forms.

23 But -- so going to the verdict forms, excuse me, you
24 want -- because we have individual defendants, I have normally
25 done verdict forms -- you can do them by count, or you can do

1 them by defendant. I think it's really important in a case
2 from, from a sense of fairness to make sure the jury is
3 focusing on each individual defendant, and so my preference,
4 but I'll let you-all tell me how you feel about it, is to do it
5 defendant by defendant.

6 So verdict as to Lohman law firm, and then we have
7 the counts. As to Mr. Lohman the counts. We can do it either
8 way, but I'd like to know, you know, what your sense is of
9 that.

10 Mr. Calhoun?

11 MR. CALHOUN: We don't have any objection to that
12 approach, Your Honor. We did it the other way in our, in our
13 proposal, but we don't have any objection to doing it that way.

14 THE COURT: All right. What's the defense counsel's
15 view?

16 MR. GRELL: Well, now that Mr. Branch is out, I mean,
17 I think -- now that Mr. Branch is out, I think it makes sense
18 to do that. And for practical purposes, I don't think there's
19 a distinction now between Mr. Lohman and the law firm, so
20 that's what's giving me pause right now, I think.

21 THE COURT: Well, that's another legitimate issue to
22 raise, again, to try to simplify this case to some degree, but
23 I think that might have ramifications down the road.

24 MR. GRELL: Well, it might have insurance --

25 THE COURT: Yeah.

1 MR. GRELL: So I might have to -- we'll probably just
2 keep those separate, because there is insurance coverage in
3 this case, and they've been treated separately so far, so I'll
4 just keep it that way.

5 THE COURT: All right. So I will have a separate
6 verdict form for the Lohman law firm and a separate verdict
7 form for Mr. Lohman.

8 MR. GRELL: Right.

9 THE COURT: And then the same thing with GST and each
10 of the GST defendants?

11 MR. CHARNOFF: That will be great, Your Honor.

12 THE COURT: Okay. All right. All right.

13 So I think for -- and then I'm going to do it by
14 count rather than by the name of the offense. So it would be
15 Count I -- sorry, Count II, RICO. It has to be done that way
16 to make it clean for the, for the Clerk's Office.

17 So I will tell the jury that we've compressed Count I
18 into Count II so they understand why we're going to say -- the
19 verdict form will be Count II, III, IV, and V. So it will say
20 Count II, you know, RICO violation. You both seem to like
21 having a heading there. So participating in the affairs of an
22 enterprise through a pattern of racketeering activity, or just
23 RICO, whatever.

24 I'm a little concerned about the damages. In the --
25 let me see. The first set of -- the verdict form on page 106

1 is whose, plaintiff's or defendants'? Because you didn't put a
2 title on it. Who did, who did the first one, do we know?

3 MR. GRELL: Mr. Calhoun.

4 MR. CALHOUN: I think the first one is plaintiff's.

5 THE COURT: All right. So the plaintiff's is 106,
6 page 106?

7 MR. CALHOUN: Yes, Your Honor.

8 THE COURT: Okay. The damages -- yeah, I'll have to
9 look at -- a bit more time on this. I want to make sure we
10 don't get into this problem of the jury awarding duplicative
11 damages. That's a problem the way I think the forms are set up
12 right now. It's just one number. There's no cap on any of the
13 damages. I treble the RICO if there's any RICO damages.

14 MR. GRELL: Right. That's my -- there does need to
15 be a separation between the tortious interference damages,
16 fraud damages, and the RICO damages just --

17 THE COURT: Because of the trebling, right.

18 MR. GRELL: So there has to be at least -- well, and
19 then there's -- then only the Lohman defendants are, are under
20 the fraud count, so that's where things get complicated.

21 THE COURT: Yeah.

22 MR. GRELL: Because it, it --

23 MR. CALHOUN: There's a separate entry for each
24 claim. We didn't do a separate entry for each defendant. If
25 the way -- we're going to restructure it the way you suggested,

1 I think there would be a separate entry for each defendant for
2 each claim? I understand --

3 THE COURT: Well, yeah, because, I mean, had
4 Mr. Branch stayed in this case, for example, I could easily see
5 if they found him liable that they might not be awarding nearly
6 as much money as to Mr. Branch as there is to Mr. Lohman. I
7 mean, they have to consider with damages the culpability of
8 each individual defendant.

9 MR. GRELL: Right.

10 THE COURT: And it would be joint and several. I
11 think one of you indicated --

12 MR. GRELL: Well, if they -- on the RICO -- I would
13 have to defer to my Virginia colleagues. On the RICO
14 colleagues, yes, it would be joint and several if RICO damages
15 are awarded.

16 So my main concern on that is -- and that's why I'm
17 very -- I'm fascinated by the verdict forms. That's why I
18 split it up into three forms.

19 THE COURT: Yeah.

20 MR. GRELL: So they were on different headers.

21 And then for space limitations, I don't object to
22 Mr. Calhoun's decision. He kind of all put them together, but
23 I had three separate verdict forms because I wanted the jury to
24 focus on RICO first, award those, and then, and then come to
25 the state law claims, and then basically there's an instruction

1 that says, do not include what you've already awarded under
2 RICO in this one. How much additional damages would you award
3 under state law claims? Basically, that's the philosophy.

4 And then there's a mitigation defense in our, in our
5 affirmative defenses, which they would have to reduce the
6 damages, which gets really confusing.

7 But that, that was my thought in having three
8 separate firms -- or forms, to get them to focus kind of on
9 these individual sets and blocks rather than just everything's
10 one big thing, and then have them move from one to one to one
11 hopefully. I mean, they can do whatever they want --

12 THE COURT: Yeah.

13 MR. GRELL: -- but you'd at least give them a
14 structure to move from one to one to one.

15 THE COURT: It's such a complicated case. All right,
16 I'll have to think about that, and we'll work on verdict forms,
17 and there may need -- I may want you here at 8:45 Monday
18 morning. I'm beginning to think that that might be an issue.

19 Okay. Well, that's that.

20 All right. In terms of the jury instructions, do you
21 want a break, or do you want to start talking about them?

22 MR. GRELL: I would just as soon keep going.

23 THE COURT: All right. You did a really good job on
24 agreeing to a fair number of them, but obviously, there are
25 disputes as to several, and we need to get those resolved. So

1 let me sort of walk you through.

2 Again, the boilerplate ones there's not going to be
3 any issues about. I've got slightly different ones. I have a
4 much fuller note-taking instruction, for example, that's closer
5 to what I said at the beginning.

6 Yeah.

7 MR. GRELL: Do you -- I've seen a lot of courts use
8 an instruction, and I thought about suggesting this to
9 Mr. Calhoun, but I thought it would just be your practice
10 anyway, do you give an instruction where the party with the
11 burden of proof, a yes vote on the verdict form is the party
12 that -- it has to be proven by a preponderance of the evidence
13 to vote yes on the verdict form?

14 THE COURT: What I actually do if there are not a ton
15 of questions, has the plaintiff proven by a preponderance of
16 the evidence X, and I -- but we can look about just doing a
17 general. Yes, I normally put the burden, because on the fraud
18 count, it's clear and convincing, right? So there are
19 different burdens.

20 And you have the burden, though, on some of these
21 affirmative defenses if you're going to go that route.

22 MR. GRELL: What's that?

23 THE COURT: You have the burden on some of the
24 affirmative defenses if you want to go that route.

25 MR. GRELL: Yeah, yeah, yeah. So that's why -- and

1 that was another reason why I put it on separate verdict forms,
2 because the yes votes should all be the preponderance votes.

3 THE COURT: Yeah.

4 MR. GRELL: And, and that makes it easier for the
5 jury to understand.

6 THE COURT: It may in this case. I'll have to think
7 about that. Because it's a long verdict form. It's going to
8 take them a while to fill this out, and I'm sure this will be a
9 conscientious jury, all right?

10 That's the other thing. Since we were just talking
11 about damages, I always put my damage discussion at the end in
12 one section rather than splitting it up. I noticed the way
13 these were submitted, there was a discussion of damages as to
14 the fraud count after you talk about fraud damages. I think
15 it's better because there's a general instruction that I
16 usually give at that section.

17 In other words, the fact that I'm instructing you on
18 damages doesn't mean that you necessarily are going to award
19 them, blah, blah, blah, and then we can -- I can break it out
20 so that, you know, as to this count, fraud, here's how you look
21 at the damages; as to this count, you know. So that's why I'm
22 going to reshuffle the order in which you gave them to me,
23 because I thought the order was out.

24 I also always put the burden of proof at the end of
25 the instructions before the final charge to the jury. That's

1 just how I've always done it in the past, and I think it works
2 better that way.

3 But in any case, the -- there's not much of a
4 disagreement about any what I call the standard ones. I do
5 think it's fair to say, "The plaintiff called several
6 defendants as adverse witnesses," rather than "an adverse
7 witness" or "the defendant." I mean, some of these were geared
8 towards individual defendants, and we have multiple defendants,
9 so I thought that that wording had to be changed. That's on
10 18.

11 The first real dispute that I saw in the instructions
12 was No. 22 and 23. It is traditional that some brief
13 description of the parties' theory of the case goes into
14 instructions, but quite frankly, Mr. Calhoun, I don't think the
15 way you've done it in your proposed 22 really helps the jury
16 because you've actually -- I mean, I'm not letting either side
17 argue their case entirely.

18 So I plan to shorten both versions, but I think it's
19 fair to have a very brief view just to remind the jury of what
20 the parties' positions is, all right? So I will -- I'm going
21 to edit that significantly because it's not the purpose of the
22 jury instructions to argue the case for the parties. It's to
23 spell out the law and only the law that's necessary to decide
24 the case. Again, it's not to be a primer on the law.

25 So that's in dispute between you-all, but I'll have

1 to rework that, and hopefully, you'll be satisfied with what I
2 give you.

3 So I think the first substantive, really significant
4 substantive disagreement was 26, which was the definition of
5 "enterprise."

6 MR. CHARNOFF: Your Honor?

7 THE COURT: Yeah.

8 MR. CHARNOFF: Counsel for Lohman defendants just
9 pointed something out. I didn't submit a separate, you know,
10 here's the defense version of the world, because I think it's
11 inappropriate for the Court to be instructing the jury at all
12 as to the narrative of the case. That's what the openings and
13 closings are for.

14 And so just to be clear, if you are going to allow 22
15 at all, then it's going to prejudice my clients to the extent
16 that --

17 THE COURT: You don't want to do it at all.

18 MR. CHARNOFF: I don't want to do it at all. I don't
19 think it's the Court's job to --

20 THE COURT: It's less paper I have to send them, and
21 it's less work that I have to do.

22 MR. CHARNOFF: So I object, I object to 22 at all,
23 which, you know, we have it in there and we object to that, but
24 I know the Lohman defendants provided you an alternative in
25 case you ruled against, but I just want to note my objections.

1 THE COURT: All right.

2 MR. CALHOUN: Thank you, Your Honor. We just thought
3 it was important because this is a complicated case, and we're
4 going to argue, and they're going to argue, and GST will argue.

5 THE COURT: Well --

6 MR. CALHOUN: A shortened version is fine, but we
7 think there needs to be something just to orient them to what
8 everything is.

9 THE COURT: I might just say to them the
10 plaintiff's -- there's four counts for you to consider in this
11 case. Here's the four counts. Defendants all are, you know,
12 say that, you know, plaintiff hasn't proved its case.

13 I'll, I'll do a very summary one then, all right?
14 That's great.

15 MR. CHARNOFF: Thank you, Your Honor.

16 THE COURT: That's easy.

17 MR. GRELL: Your Honor, I mean, I trust your summary,
18 that it will include our affirmative defenses as well?

19 THE COURT: Make clear for me what your affirmative
20 defenses are because I'm not convinced you actually clearly
21 articulated them in your opening statement.

22 MR. GRELL: No, I didn't --

23 THE COURT: Yeah.

24 MR. GRELL: -- because I, I wanted to focus on their
25 issues --

1 THE COURT: Okay.

2 MR. GRELL: -- that they had to prove.

3 *Noerr-Pennington*, accord and satisfaction --

4 THE COURT: Do you -- you know, the -- well, all
5 right. If you use the term "*Noerr-Pennington*," you're going to
6 confuse them.

7 MR. GRELL: I word it "First Amendment" in our
8 instructions. Yeah, I agree, that's -- and you'll see in the
9 instructions I have mine captioned -- First Amendment,
10 Mr. Calhoun, is *Noerr-Pennington*.

11 MR. CHARNOFF: I'll remind Mr. Grell, collateral
12 estoppel.

13 MR. GRELL: Collateral estoppel, waiver, and failure
14 to mitigate.

15 So First Amendment, accord and satisfaction,
16 collateral estoppel, waiver, failure to mitigate.

17 THE COURT: All right. And is GST raising those same
18 four? No, you wouldn't have the First Amendment issue.

19 MR. CHARNOFF: No, we wouldn't have First Amendment,
20 Judge, but, you know, a lot of this is derivative. I mean,
21 obviously, if the other half of this alleged conspiracy isn't
22 doing anything wrong or it was already released, in other
23 words, Navient had the opportunity to litigate and actually
24 litigated the manufactured defense, you know, in 80 of the 83
25 cases and they've already been ruled upon, why do they get a

1 second bite at the apple here, and then --

2 THE COURT: All right. So I'll just say "the
3 defendants" as a group.

4 MR. CHARNOFF: Thank you.

5 THE COURT: Lump you-all together, okay? All right.

6 All right. So the next one that I think there was a
7 substantive dispute about was 26, which is the definition of
8 "enterprise," and I thought of the two instructions, the
9 plaintiff's was, was better. First of all, it's right from
10 O'Malley, and I don't think there's a significant material
11 difference between what the defendants offered and the
12 plaintiff offered.

13 Mr. Grell, you're the RICO person. I mean, is there
14 what you think a substantive mistake?

15 MR. GRELL: Well, I thought it was important, the
16 main difference is on common purpose under the *Boyle* standard,
17 and given that in this case, that is -- that has been a huge
18 issue, I thought -- and given that there's controlling Fourth
19 Circuit authority on that in *Pinson*, the jury was entitled to
20 be instructed on *Pinson*, and it is directly applicable to the
21 arguments that we're making, and --

22 THE COURT: But the word "purpose" is a word which I
23 think the jury can understand. Venture starts to get
24 complicated, undertaking the project.

25 I mean, that extra verbiage I don't think helps, and

1 I think that the -- I mean, O'Malley is a very solid,
2 well-established source, and this certainly tracks O'Malley.
3 And 90 percent of the plaintiff's instruction is consistent
4 with yours.

5 MR. GRELL: No, I mean, I generally -- Mr. Calhoun
6 drafted these, and then I just -- we -- I didn't, I didn't
7 rewrite -- I don't think I rewrote anything really.

8 THE COURT: Yeah.

9 MR. GRELL: I just added in where I thought there was
10 direct Fourth Circuit case law, and if you -- you're the -- you
11 get to instruct the jury --

12 THE COURT: Yeah.

13 MR. GRELL: -- so I, I would maintain it's still
14 appropriate to instruct them on that standard in *Pinson*, but,
15 yeah, I can still argue it, but I think it is a directly
16 applicable --

17 THE COURT: All right. Well, I'm going to use -- I
18 will use the plaintiff's so -- all right.

19 MR. URBAN: Your Honor, there was one sentence that
20 we wanted in there: "Navient claims that defendants formed an
21 association-in-fact enterprise." I do think that's important
22 because that's the enterprise they --

23 THE COURT: It's here. It says, "Navient has alleged
24 an association-in-fact enterprise." It's in their first
25 paragraph.

1 MR. URBAN: No, no. That claims the defendants.
2 That's the definition of who they said was in the
3 association-in-fact enterprise.

4 MR. CALHOUN: That's asking the Court just to adopt
5 their argument, Your Honor.

6 THE COURT: No, wait, I'm sorry. The sentence that
7 they have at the end of their first paragraph is, "Navient has
8 alleged an association-in-fact enterprise." You want me to add
9 the words, "Navient has alleged that the defendants formed an
10 association-in-fact"?

11 MR. URBAN: Exactly, Your Honor.

12 MR. CHARNOFF: Because that's how they pled it.

13 MR. URBAN: That's how they pled it.

14 MR. CHARNOFF: Otherwise --

15 MR. CALHOUN: This is, this is their issue, that they
16 were trying to say that to the extent we have unindicted
17 coconspirators, which I'll use in the sense that we don't get
18 to argue about them. That's, that's what this is about. And
19 then so they want to -- you know, the statute is the statute.
20 We've alleged an association-in-fact enterprise. That's what
21 it requires.

22 What they're trying to do is through the back door
23 have you limit what we can -- the parties can argue about.

24 THE COURT: Oh, you can argue about Mize up to the
25 end of the earth. I mean, he's part of this case.

1 MR. GRELL: Yeah, he's part of the enterprise --

2 THE COURT: Yeah.

3 MR. GRELL: -- but it's all these, Slaughter and
4 Johanson.

5 Look, every -- I know when U.S. attorneys plead RICO
6 claims, they always plead these gigantic association-in-fact
7 enterprises. They include everybody from here to the moon.

8 Civil lawyers cannot get away with that because it's
9 the particularity standard, and when you -- you have to plead a
10 common purpose. Number one issue on a motion to dismiss is how
11 do you -- how do you plead a common purpose when there are 50
12 John Does in your enterprise? How do you plead that these
13 no-name people share a purpose with you or are related to you?

14 And in this situation, you've got -- they have to
15 prove who is in their enterprise, who shares the common
16 purpose. They can't keep moving the ball like this.

17 They -- in 316 of their second amended complaint,
18 they say defendants have formed an association-in-fact
19 enterprise, and this is again, Your Honor --

20 THE COURT: All right, but, but in the original
21 complaint, the defendants were all those other people.

22 MR. CHARNOFF: No.

23 MR. GRELL: Johanson and Slaughter have never
24 been defendants in this case.

25 THE COURT: All right, but, I mean, but Mize was

1 there. There were --

2 MR. GRELL: That's not, that's not at issue. They
3 need to define who their enterprise is. That is not on you.
4 That's not on me. That's not on the jury. That's on them, and
5 they won't do it, and it's driving me crazy.

6 MR. CHARNOFF: Your Honor, I don't know if it's
7 driving me crazy on behalf of GST, but it's close. If
8 plaintiffs were entitled to craft the case however they wanted
9 to craft it, they filed a complaint, they filed an amended
10 complaint, they filed a second amended complaint, so I came
11 into this case maybe a year ago, a year and a half ago.

12 Of course, you can have unindicted coconspirators.
13 Yes, you can have people who are part of the enterprise who are
14 not party defendants. It's just not true here.

15 They pled that everyone who's in the
16 association-in-fact enterprise were defendants, and now they're
17 trying to give themselves wiggle room so they can confuse the
18 jury and say people who were never named in the enterprise,
19 i.e., all the attorneys other than Mize, the debt relief
20 attorneys other than Mize, who were not named, that they're
21 somehow in these -- in this association enterprise and confuse
22 the jury.

23 We can't have that.

24 MR. GRELL: I mean, literally, I will not know what
25 his enterprise is until he's done with his closing argument and

1 I've got to stand up and give mine. That's -- that is not
2 fair, and especially when there are such issues about common
3 purpose in this case.

4 MR. CALHOUN: May I respond, Judge?

5 THE COURT: Yes, go ahead.

6 MR. CALHOUN: You know, this argument is one that I
7 find a little bit confusing. We had summary -- we've had
8 motions to dismiss. We've had summary judgments. We've had
9 motions in limine.

10 Slaughter, Johanson, and Ruggiero are all in the
11 complaint. There are numerous allegations about their
12 involvement in this enterprise. The fact that we say
13 defendants formed an enterprise, we didn't say defendants and
14 only defendants were engaged in this enterprise.

15 It's just -- they're parsing words in a way to try to
16 take advantage of it. It just doesn't make any sense. I think
17 the instruction, it works, and we should move.

18 MR. GRELL: This is exactly why you have Rule 9(b),
19 to prevent this argument that he just made. Yeah, I'm parsing
20 words, especially in a fraud claim.

21 THE COURT: All right, we're not going to --

22 MR. GRELL: And he had the right to plead however he
23 wanted to.

24 MR. CALHOUN: We're talking about jury instructions.

25 THE COURT: Just a second. Just a second.

1 MR. GRELL: Yeah, by this time, you should know
2 what --

3 THE COURT: I'm going -- I'm going to go back and
4 double-check O'Malley to make sure this is absolutely verbatim
5 from O'Malley. If it's verbatim from O'Malley, I'm going to go
6 with it, but it does not restrict anyone from arguing.

7 So -- but, Mr. Calhoun, I would strongly suggest to
8 you that getting into people who are not specifically named
9 extensively in this case, who are not named defendants, you
10 don't have that much time, and I think this jury, the biggest
11 danger all sides have is confusion. You know, you could wind
12 up with a, with a hung jury on this one, too. It could easily
13 find we just can't figure it all out.

14 And so it doesn't, in my view, help the plaintiff to
15 be spending a whole lot of time on naming people who really
16 have not been in the course of the trial pivotal players, but
17 I'm going to -- as long as O'Malley gives this clear
18 instruction, "Navient has alleged an association-in-fact
19 enterprise," and I think I looked at Sand's last night as well,
20 and I think that's also how Sand's does it, that's all that's
21 necessary.

22 Sometimes jury instructions, you know, there are two
23 philosophies. You give the jury the minimum amount they need,
24 just the skeleton. Other times, you know, how much flesh do
25 you put on the skeleton? There's always a danger when you

1 start putting flesh on because you can put on too much. Juries
2 can always come back and ask a question if they don't
3 understand.

4 MR. GRELL: But, Your Honor, in this case, given
5 RICO, you have to -- you have to -- and I agree that this was
6 decided in motions to dismiss and such, but the plaintiff has
7 to define the enterprise because that's what everything is
8 built around.

9 The enterprise has to be sustained from the
10 defendant. The enterprise has to be operated and managed by
11 the defendant. The enterprise has to conduct the -- has to --
12 the acts of racketeering have to be conducted through the
13 enterprise.

14 It's, it's a -- I can't express how fundamental it
15 is, and I need to know what that is before I stand up to give
16 my closing argument.

17 I mean, I agree that, that he could do whatever he
18 wanted to do at the pleading stage, and even after your motion
19 in limine, if there had been a coherent theory that he
20 expressed in his opening statement or something, I was waiting
21 for it, there's just nothing.

22 He could literally stand up and say the Law Offices
23 of Jeffrey Lohman are an enterprise, which, okay, well, then
24 what happens to GST? What do I -- and this whole big
25 enterprise? I have no idea what he's got for an enterprise

1 right now.

2 THE COURT: All right.

3 MR. GRELL: It's very unfair, and it's -- it is
4 just -- I've never heard of it. This is -- and it's unique
5 about RICO. They need to tell us what the enterprise is.

6 THE COURT: All right. Well, as I said, I'm doing
7 jury instructions right now, and the jury instructions are
8 going to be what I'm comfortable with, and right now,
9 O'Malley -- if O'Malley does it somewhat differently, I'll
10 double-check, but I don't think it does.

11 MR. GRELL: But, but O'Malley will just -- it assumes
12 that the enterprise has already been defined by the defendant,
13 and it hasn't been.

14 THE COURT: All right.

15 MR. URBAN: Your Honor, and if I may --

16 MR. CALHOUN: Could we just have one person per side,
17 Your Honor?

18 THE COURT: Yeah, it should be one person per issue.

19 MR. URBAN: We had divided certain issues, and this
20 sort of throws two issues together. All I was going to say is
21 plaintiffs filed the complaint to put defendants on notice what
22 their allegations are. If you look at the second cause of
23 action, it specifically in paragraph 316 says, "Defendants have
24 formed an association in fact that is an enterprise within the
25 meaning of 18 U.S.C. 1961(4), which enterprise has at all

1 relevant times been engaged in activities," etc., etc.

2 If you look at the rest of the cause of action, none
3 of those people that they want to bring in -- Johanson,
4 Slaughter -- are mentioned anywhere in this count. So what we
5 were put on notice of throughout this case was that it was the
6 defendants who were the enterprise, nobody else.

7 Now, they mentioned everyone else earlier in the
8 complaint, but once when they got to the point where they were
9 supposed to define who's who in the enterprise, they defined it
10 only as defendants, and we're fine including Mize in that
11 because he was a defendant at some point.

12 THE COURT: All right. Again, I'm going to take a
13 look at O'Malley, and I'll let you know, but look for it when
14 you get the instructions.

15 Okay. The "association" definition was agreed to by
16 you-all.

17 And again, the next one, Jury Instruction 28, was the
18 definition "to participate in the conduct of the enterprise's
19 affairs." On this one, again, there was not a major dispute.
20 It's just the defense does seem to add additional language.

21 So I think you actually were in agreement on the
22 first paragraph, as I understand your approach, and then you
23 wanted this extra language added, which all comes from various
24 cases from different districts.

25 MR. GRELL: Well, when it comes to professionals,

1 that's -- that all flows from the *Reves* case because those were
2 accountants in *Reves*, and they were held not to have operated
3 and managed the enterprise because they were operated pursuant
4 to the rules of accounting, standard practices.

5 And for professionals -- and there just doesn't
6 happen to be a Fourth Circuit case applicable, but it's
7 universally regarded that professionals are not operators and
8 managers simply by acting like professionals, and it comes
9 right from *Reves*.

10 THE COURT: I understand that, but I think it adds
11 again more, more flesh on the bones than is necessary in a
12 jury -- in jury instructions. But I do have one on attorneys
13 down the road that I think takes care of any concerns about
14 that. So my plan is to use the Plaintiff's Proposed 28.

15 This is a minor point on 29 because it's agreed to,
16 but I am concerned again because the jurors will read this
17 literally, and we have two corporate entities here. So do you
18 want to use just the word -- again, "a defendant must use his
19 or its," I was going to put in here, acts of racketeering,
20 because we're talking about two "it" defendants, so that they
21 don't get confused that this only applies to the individuals,
22 all right?

23 MR. CALHOUN: Fine, Your Honor.

24 THE COURT: All right. In terms of racketeering
25 activity, my understanding is that everybody agreed to the

1 first portion, and then the plaintiff wanted the Court to add
2 the other language, and the defendants wanted that omitted.

3 I'm going to omit the extra language following my
4 approach to giving the jury the skeleton but not all the flesh,
5 all right? I don't think it's necessary to add that, and it's
6 again something I don't normally do with instructions. Okay.

7 The same thing with mail fraud. I think the
8 defendants' proposed -- that's No. 31. I think that is a
9 cleaner, more explicit definition. It doesn't differ
10 significantly from the plaintiff's, but I think that's better.

11 MR. GRELL: Which one, Your Honor?

12 THE COURT: Your -- I'm going to use the Defendants'
13 31, definition of "elements of mail fraud."

14 Okay. You agreed on 32, racketeering activity in
15 terms of wire fraud. Again, there was a little bit of a debate
16 about the elements of wire fraud. I think the defendants'
17 again is the cleaner, simpler one, and therefore, I'm using the
18 defendants'.

19 You agreed on 36. You agreed on 37. There's no
20 problem with that. 38 is not a problem.

21 On 39, which is the definition of "false statements,"
22 I believe the only thing that you-all disagreed about was the
23 inclusion of that what I'll call the third paragraph in the
24 plaintiff's proposed, and I don't think you need that. I think
25 the rest of the, of the instruction is perfectly clear.

1 So the defendants' proposed one, as I recall, has
2 everything that was in the plaintiff's except for those four
3 numbered entities, and so I don't intend to give that. So I
4 will give the defendants' version on that one.

5 Now, I looked at Instruction 40, and I looked, we had
6 the -- we had enough time to check all the cites on that. I
7 think that is an appropriate instruction to give in this case
8 to make sure that the jury understands the difference between
9 racketeering and being involving in aggressive and possibly
10 frivolous legal activity.

11 The only sentence that I don't find is adequately
12 called for in the citations is the middle sentence: "Likewise,
13 an attorney's performance of unauthorized work is at worst a
14 violation of the rules of professional responsibility but is
15 not an act of racketeering."

16 I don't think we need that. I think the rest of it
17 adequately protects the attorney defendants' interests.

18 Mr. Calhoun?

19 MR. CALHOUN: Your Honor, that might be fine, but I
20 would suggest that we take out the term "fraudulent" if it's
21 frivolous and baseless litigation activities, but when you say
22 "fraudulent," and then that's defined out of -- I'm concerned
23 that they'll say that's not mail fraud because the judge said
24 fraudulent litigation activities can't qualify. And so there
25 needs to be a distinction between fraud and other types of

1 activities.

2 THE COURT: But this, this has to do with
3 racketeering. That's the problem. Because you've got the RICO
4 case in here. And so I think it has to be there because the
5 essence of the racketeering cause of action is mail or wire
6 fraud.

7 MR. CALHOUN: Correct, Your Honor, but if part of
8 that is a fraudulent litigation activity, that's part of the
9 RICO predicate, I'm afraid this is going to --

10 THE COURT: Well, I mean, frankly, the case is
11 complicated because of the way you chose to do it. You could
12 have just done this as a fraud case or as a, you know,
13 intentional interference with contract case. You wouldn't get
14 your treble damages then, but by making it RICO, it makes it
15 complicated.

16 But this has to do with making it clear to the jury
17 what is or is not an act of racketeering, and I think that
18 "fraudulent" has to be in there, and that's supported by the
19 case law.

20 MR. CALHOUN: Can we add "unless it qualifies as mail
21 or wire fraud"?

22 THE COURT: It says "without more." That "without
23 more," I think, adequately protects, and you can argue it.
24 You'll have the instruction if you feel you need to do that,
25 all right?

1 Yes.

2 MR. GRELL: Yeah, I agree. He has argued about that,
3 that throughout the trial.

4 THE COURT: All right? So, so your 40 with that edit
5 is going in, all right?

6 MR. GRELL: All right.

7 THE COURT: But 41 is not going in. I don't think
8 it's necessary, and again, I don't give instructions that are
9 unnecessary. 40, I think, adequately protects the defendants
10 from somehow the jury misconstruing things.

11 The issue about ratification, though, has come in in
12 this case, and I think the jury does need to understand what
13 that is, so I'm leaving that in. I know the plaintiff did not
14 want it in there, but I think it's appropriate. The issue has
15 been raised and needs to be addressed.

16 I, however, think that 43 starts to argue the case,
17 the defendants' proposal for intentional default. The
18 plaintiff doesn't want that instruction, and I don't think
19 that's appropriate or necessary in this case, so that will not
20 go in.

21 The one I'm totally confused about is 44, because I
22 looked at Sand's on that, and that particular instruction about
23 unanimity, which I think is incredibly confusing, its only
24 source for that is the Fifth, Seventh, and Eleventh Circuits.
25 So obviously, not all circuits give it. It's not been given in

1 the Fourth Circuit, and I think it's going to unnecessarily
2 confuse the jury.

3 So I know that's a defense proposed instruction.
4 Mr. Grell?

5 MR. GRELL: That was one proposed by Mr. Charnoff, so
6 I will defer to him.

7 THE COURT: Mr. Charnoff? I mean, I agree -- and,
8 you know, in certain criminal statutes, like a 371 conspiracy,
9 the jury has to be unanimous as to at least one overt act, but
10 I don't see where that's coming from in the RICO statutes or
11 the RICO cases that I've had. I don't believe I've ever given
12 this instruction before, and it has so little authority for it.

13 Where did it come from? Was it from Sand's?

14 MR. CHARNOFF: This is 44, Your Honor?

15 THE COURT: Yeah. Was it from Sand's?

16 MR. CHARNOFF: I got it from Modern Federal Jury
17 Instructions. I don't feel strongly about it. I mean, I
18 thought it was a proper instruction.

19 THE COURT: All right.

20 MR. CHARNOFF: A bizarre fact entered in this case.

21 THE COURT: I mean, it's not -- had this complaint
22 listed very specifically, you know, acts, but it doesn't, and
23 so the jury would never figure this out. So, okay, I'm going
24 to strike 44, all right?

25 MR. CHARNOFF: I understand, Your Honor.

1 THE COURT: Okay. You agreed to the definition of
2 "pattern of racketeering." I've, of course, taken out witness
3 tampering, so again, this one has to be edited slightly.

4 I think, though, it's important whenever I have a
5 multiple-defendant case, I do try to make sure the jury
6 understands, I remind them as many times as possible they have
7 to look at each individual defendant, so I'm going to be adding
8 language, you know, the defendant at issue committed, I mean,
9 or something to try to focus the jury's attention on they have
10 to consider each individual defendant in this case, all right?
11 But other than that, you agreed on the language. That's fine.

12 You agreed on 46.

13 Now, with 47, which is the elements of a -- of the
14 conspiracy --

15 MR. GRELL: Just to --

16 THE COURT: I'm sorry.

17 MR. GRELL: For editing purposes, "Mr. Branch" has to
18 be taken out.

19 THE COURT: Yeah, we're going to try to make sure
20 we've gotten all of that. If we miss one, that's the kind of
21 thing you should be reading for carefully on -- over the
22 weekend.

23 I'm having trouble truly parsing what the difference
24 is between the two versions that you want for the elements of
25 1962(d).

1 MR. GRELL: Well, Your Honor, my main issue is that
2 they have to prove a 1962(c) violation for reasons we discussed
3 already.

4 THE COURT: Right.

5 MR. GRELL: And I think that is the main difference.

6 I think also, I can't recall if it's in George's
7 final instruction, but I think at some point, he was -- to me,
8 the overall criminal objective is the 1962(c) violation, not
9 mail and wire fraud. It's the whole RICO claim. That's
10 what -- it's a conspiracy to violate RICO, not -- did you keep
11 that in, or did you change that?

12 MR. CALHOUN: Which one are you on?

13 THE COURT: We're on 47.

14 MR. GRELL: I would just focus it on the RICO
15 violation and the overall criminal objective has to focus on
16 the RICO violation, and not the individual acts of
17 racketeering.

18 MR. CALHOUN: Your Honor, I don't think there's a
19 major difference between these two instructions. The -- you
20 know, we have some language from *Burgos* in here, but I think
21 Mr. Grell's, what he's asking is that we say we must prove that
22 one must have violated 1962(c). 1962 only requires that you
23 conspire to violate 1962(c). That's the literal language of
24 the statute.

25 His point, frankly, comes up in damages. If we don't

1 prove a 1962(c) violation, there's no damages.

2 THE COURT: There's no -- yeah.

3 MR. CALHOUN: It doesn't belong here.

4 MR. GRELL: Well, that is not true.

5 THE COURT: If there's no underlying 1962(c), there
6 is no (d).

7 MR. GRELL: Right.

8 THE COURT: And you can give the jury an instruction
9 if you do not find liability as to Count II, bypass Count III.

10 MR. GRELL: That's -- and that's what my verdict form
11 does.

12 THE COURT: Yeah.

13 MR. GRELL: And that's -- as long as it's on the
14 verdict form.

15 THE COURT: No, it helps to have the instruction.

16 MR. GRELL: Yeah. I mean, the first thing, if they
17 get there and it's like, oh, we didn't find a 1962(c)
18 violation, so we don't need to read this, and then they can go
19 on to the next one.

20 So I think it's important to keep that first point in
21 that's in our proposed instruction, you know.

22 THE COURT: Yours is that at least one defendant
23 violated Section 1962(c), right?

24 MR. GRELL: Yeah.

25 THE COURT: Now, I think where the problem may come

1 is as an operator or manager. I don't think that's necessary.

2 MR. GRELL: And I don't -- however, I was trying to
3 make it clear, but again, what's clear to me, people tell me
4 this all the time, what's clear to me is not clear to everybody
5 else, so that may be too technical, and I'm not -- I just want
6 to make it clear for the jury, and I would defer to your
7 judgment on that, Your Honor.

8 THE COURT: All right. But you would agree that at
9 least one defendant violated 1962(c).

10 MR. GRELL: Correct.

11 THE COURT: That's the first and most pivotal
12 element.

13 MR. GRELL: Yes.

14 THE COURT: Right. And then here's my problem: The
15 terminology "another defendant," I mean, basically, to hold
16 somebody responsible for being part of the conspiracy, there
17 has to be first of all, there's one person -- the problem is
18 nobody can conspire by themselves.

19 This is -- I realize this is language that's been
20 used before, but it really doesn't make good sense.

21 MR. GRELL: Well, I mean, if I was the plaintiff, I
22 would have done this totally different. I'm not the plaintiff,
23 and it was -- I was trying to work within the context of
24 Mr. Calhoun's instructions.

25 THE COURT: Yeah.

1 MR. GRELL: You know, I understand sometimes, you
2 know, you define these terms like "conspirators" versus
3 "defendants" or "operators and managers" versus "conspirators,"
4 you sort of give the jury a definition of what these terms
5 mean, and I do that a lot in my complaints, so again, I, I was
6 trying to keep as much of the theme and sort of the
7 organization -- and I'm not putting the blame on Mr. Calhoun.
8 I was just trying to make things more similar so that it was
9 maybe easier to read.

10 But if you -- and you've seen more of these than I
11 have, so if you've got ways to clarify it, I will not object, I
12 can't imagine.

13 THE COURT: All right. We'll spend a bit of time on
14 this one, but take a careful look at it over the weekend when
15 you get these, all right, because that's one that I think we
16 may have to spend a bit of time working on.

17 And we may wind up combining 47 and 48 because 48 may
18 assist a little bit in understanding that, but anyway, there's
19 a partially agreed 48, and then on page 71, the plaintiff
20 wanted an additional section. It says, "To prove that an
21 individual was a member of a RICO conspiracy, a plaintiff need
22 show only 'slight evidence.'"

23 No, that's not correct. That would not be proper.
24 And you're taking that from the criminal jury instructions,
25 which I think is -- for the Eighth Circuit. That's pretty poor

1 authority in my view.

2 MR. CALHOUN: That's where it came from. I think
3 that's completely consistent with *U.S. v. Burgos* from the
4 Fourth Circuit, Your Honor.

5 THE COURT: What, "slight evidence"?

6 MR. CALHOUN: Once a conspiracy is established, yes.

7 THE COURT: I'm not comfortable giving that unless --

8 MR. GRELL: And, Your Honor, I object. The Eighth
9 Circuit is a very, very reputable circuit.

10 THE COURT: I didn't put the Eighth Circuit down.
11 I'm just saying that's --

12 MR. GRELL: They actually have more, they do have
13 RICO instructions, so that's why I've borrowed it from there.

14 THE COURT: I mean, have you used -- have you seen a
15 "slight evidence" instruction like this before?

16 MR. GRELL: No, no, no. I completely agree with you.
17 It confuses the preponderance of the evidence situation.

18 THE COURT: Yeah. So I'm going to give just what's
19 on 70 there because you-all had agreed to the language on 70.
20 All right?

21 Then 81, page 81 -- I'm sorry, page 72, Instruction
22 49, this is only the defendant's proposal for civil standing.
23 "In order to recover damages under RICO, Navient must have
24 standing. A plaintiff has standing only if it is the type of
25 victim that was authorized by Congress to bring a civil lawsuit

1 under RICO."

2 I think you can argue that issue, but I don't think
3 it's appropriate to give it this way because we have elsewhere
4 in the instructions the need to have, to have been injured.

5 MR. GRELL: Well, the issue is -- I was just trying
6 to define what "standing" meant in the statutory context
7 because it's come up through various witnesses, the issue of
8 standing, because who's got standing under the, under the TCPA,
9 who has -- you know, standing is basically who, who Congress
10 authorizes to bring a civil claim under that statute --

11 THE COURT: Right.

12 MR. GRELL: -- which, which I agree, it normally
13 would be confusing, but in this context, where standing is,
14 like, it's not only an issue in the RICO case, but it's also an
15 issue in the underlying TCPA litigation.

16 THE COURT: But you'll confuse the jury by using a
17 technical term like "standing." Your argument in the case has
18 been the plaintiff wasn't injured because it doesn't own the
19 debt or it doesn't get the debt until all this is over, and
20 that's what you're really arguing, that there's been no injury.

21 MR. GRELL: And I, I would defer to you on whether we
22 need a "standing" definition. My main thing about proposing
23 this instruction, I was just trying to be projecting an issue
24 that might confuse the jury, but I'll defer to you.

25 THE COURT: All right.

1 MR. GRELL: My main thing is that the whole, you
2 know, civil standing under RICO, which is statutory standing,
3 not constitutional standing, statutory standing is a higher, a
4 higher burden, and you have to prove what Congress has said.
5 This, Navient, you must prove these two elements to, to have
6 standing under the statute.

7 We don't need to tell the jury -- you've got to
8 prove -- to recover damages, you need to prove injury by reason
9 of to your, to your business or property.

10 THE COURT: Well, in any case, I wouldn't be
11 surprised if when we look again at the damage instructions,
12 that this basically is going to be there. The plaintiff will
13 always have the burden of proving by a preponderance of the
14 evidence that it was the victim, that it was damaged.

15 MR. GRELL: I am not wedded to this instruction.

16 THE COURT: Okay.

17 MR. GRELL: I mean, I just think as a housekeeping
18 thing, it kind of sets up an outline for the jury on why we're
19 moving to this next, like you said, the count things, dividing
20 it up into counts --

21 THE COURT: Yeah.

22 MR. GRELL: -- I just don't want the jury to be
23 confused, like, okay, we're moving from 1962(c), and they won't
24 have the statute, but it is a different statute so --

25 THE COURT: Well, I understand the argument. It's

1 not --

2 MR. CALHOUN: I'm sorry, if you're going to take it
3 out, I won't say anything.

4 THE COURT: I'm taking it out. You won. You should
5 sit down.

6 MR. CALHOUN: I'm sitting down.

7 THE COURT: Okay. All right, the next one is 50, and
8 this really again begins to dovetail the previous one because
9 it's the proposed RICO injury definition, and it's right there,
10 I think, the obligation, the requirement that it must prove the
11 defendant RICO violations were the proximate cause of injury to
12 Navient's business or property. "Therefore, you must find that
13 Navient suffered an injury to its business or property and that
14 the injury was caused by reason of the defendants' violation of
15 RICO." Right?

16 So that really covers, Mr. Grell --

17 MR. GRELL: I -- it was just a housekeeping
18 instruction.

19 THE COURT: Okay.

20 MR. GRELL: So like I said, you've done this a lot
21 more than I have, so --

22 THE COURT: So I think I'm having trouble parsing
23 where the really -- where the rub is here other than this
24 language, where's the real difference between -- because
25 O'Malley supports the plaintiff's instruction.

1 What is it in yours that you feel needs to be here
2 that is not adequately covered by O'Malley's instruction?

3 MR. GRELL: Well, I think O'Malley -- first of all,
4 there's no -- I'm not sure that it's so important in the
5 context of this case, but I think O'Malley is wrong. I mean,
6 for one thing, there's no requirement of "but for" causation.
7 That's just right out of *Holmes*.

8 And then, and then there are -- there's -- again,
9 there's so much authority for the proposition that the acts of
10 racketeering need to be the cause of injury, not -- and that's
11 right out of *Sedima*, which again, in this case, there's so many
12 things, like there's negligence, there's ethical violations.

13 The jury needs to know it has to be mail and wire
14 fraud that caused the injury, not this other stuff, and that's
15 *Sedima*, and I don't think O'Malley sufficiently addresses that.
16 I don't think O'Malley sufficiently addresses the fact that
17 RICO does not confer standing upon misfortunes visited upon
18 third parties.

19 Again, it's a critical issue here because -- and that
20 is, and that is out of *Holmes* and *Hemi*, and it's a critical
21 issue because we've got this whole issue with promissory notes
22 and who owns the notes versus Navient is just a servicer.

23 And these are Supreme Court cases. I mean, this is
24 very strong authority that we're relying upon here.

25 THE COURT: Well, I think the language -- we do have

1 to have in here -- I'm going to probably cobble the two
2 together because, for example, the plaintiff cannot recover for
3 harm visited upon third parties.

4 MR. CALHOUN: Right. And we're not trying to.

5 THE COURT: All right. So -- but again, that issue
6 is circulating in this case.

7 MR. CALHOUN: It's a consideration if they get to
8 punitives, but it's not an element of our damages.

9 MR. GRELL: Your Honor, they're trying to -- they're
10 trying to recover on behalf of themselves when they're, they're
11 a third party to this whole loan contract.

12 THE COURT: Well, that's an argument.

13 MR. CALHOUN: That's an argument. And that's the --

14 MR. GRELL: I know, but that's --

15 MR. CALHOUN: Can I finish my argument, please?

16 THE COURT: All right. So on 50, I'm going to
17 probably meld some of the things that you wanted into the
18 plaintiff's instruction, because I think that one, amongst
19 others, is certainly important.

20 MR. CALHOUN: Yeah, certainly the last couple, Your
21 Honor, we thought were just argument.

22 THE COURT: All right. And then we have 51 is
23 another one, injury to business or property. And the
24 defendant -- again, this is out of O'Malley, and I'm just going
25 to make sure, I'm going to trust you, Mr. Calhoun, if you tell

1 me O'Malley, you've not edited O'Malley.

2 MR. CALHOUN: I don't think that we have, Your Honor.

3 THE COURT: I don't think you have. I haven't sat
4 down and parsed it word for word, but I think this is correct.

5 MR. GRELL: Well, I would doubt O'Malley refers to
6 Navient, and -- unless there's a bracketed comment. I think
7 that there's a lot of argument in here, and I would be
8 surprised that O'Malley is this biased in favor of the
9 plaintiff, but maybe I'm wrong.

10 THE COURT: But I'm looking -- I'm looking at yours
11 because it's shorter. I like shorter, and everything I'm
12 seeing in here so far is consistent.

13 Again, some of it's going to be repetitive of other
14 damage instructions, and I don't want to have to give the same
15 instruction twice, but, I mean, my general damage ones would
16 say they can't be speculative.

17 MR. GRELL: And the, and the thing about our
18 instruction is we give them injury to business or property.
19 we're not even -- there's no need to define it because we say
20 that they're a business. They can only be injured in their
21 business or property. They don't have emotional distress.

22 I don't know why they didn't take that, but they
23 didn't take it.

24 THE COURT: All right.

25 MR. GRELL: So I just point that out, too.

1 THE COURT: I'm actually inclined, even though I like
2 O'Malley usually, I think this is a shorter, simpler
3 instruction. I may just change my other damage instruction a
4 little bit on that, okay?

5 So right now, I'm inclined to give 51. I'll think
6 about it a little more, but that looks like a better
7 instruction.

8 All right. Now, the elements of fraud, so what I
9 would be doing is I'd make it clear to the jury that this has
10 to do with Count 4 of the complaint so that it's clear that
11 it's different from what we've been discussing with the RICO,
12 and it's right there. So I think it's important to put "In
13 Count 4 of the complaint, Navient claims," again, we'll take
14 out "Mr. Branch," and this is only as to the Lohman defendants.

15 And I'm not going to repeat the claim itself because
16 that's -- I'm not going to do that, but I don't think you
17 disagree on the essential elements here.

18 MR. GRELL: No, it's mostly -- I think reliance,
19 there's a separate instruction on reliance, so that I don't
20 think is appropriate in this instruction, and then I haven't
21 found any -- I, I looked at Mr. Calhoun's authority on the
22 reckless indifference. I know that's a common standard, but I
23 couldn't find reckless indifference under any Virginia case,
24 let alone the ones that he cites, and so I took that paragraph
25 out.

1 And that was my only -- my biggest issue was that
2 reliance was misplaced, and I don't know where he gets the
3 authority for reckless indifference.

4 THE COURT: Mr. Calhoun, do you remember where you
5 got it from?

6 MR. CALHOUN: I don't, Your Honor.

7 THE COURT: I think that is potentially a problem.

8 MR. GRELL: I mean --

9 MR. CALHOUN: I think it is a standard, but that's --

10 MR. GRELL: I literally searched Virginia for
11 reckless indifference, federal and state in Westlaw, and there
12 are just no cases.

13 THE COURT: Yeah. Well, that is a state cause of
14 action, so we'd be using the state definition of the, of the
15 elements.

16 MR. GRELL: Right, but to the extent, though, for,
17 like, you in this case applying Virginia law, it should have
18 come up. I just -- I did a very simple search, and it just
19 didn't come up.

20 THE COURT: All right. We'll take a look at that,
21 but basically, that's the main rub there.

22 All right. And then we have reliance. I mean, I
23 know that Virginia has case law on what is considered to be
24 reasonable reliance or unreasonable reliance, and something
25 does have to be given there. I'm not really fond of -- I see

1 the plaintiff doesn't want an instruction, and the defendant
2 does. It does have to be something.

3 MR. CALHOUN: Your Honor, our main concern here is
4 that whatever the instruction is doesn't completely preclude
5 the forced reliance argument that we've been making throughout
6 the case.

7 THE COURT: Okay. Yeah. This, this, though, you've
8 got too much, I mean, argument, it seems to me. "Truth in the
9 discovery process," yeah, that's beyond where it should be. So
10 we'll take a 30-second look at that. That shouldn't be
11 difficult.

12 Okay. Fraud damages, no issue there.

13 And then this is Count 5, the business expectancy,
14 and this goes to -- okay. I think you basically agree to most
15 of this.

16 MR. CALHOUN: Yeah. Your Honor, I think that the
17 main thing that we disagree on is their final instruction,
18 which is essentially asking Your Honor to take the issue of
19 whether Navient has an interest or business expectancy away
20 from the jury. We don't think that last paragraph belongs in
21 here.

22 MR. GRELL: Well, again, they stipulated to it. They
23 pled it in their complaint. It's been an undisputed fact since
24 the beginning of this litigation.

25 Just because Mr. Standish tries to muddy the water

1 doesn't make it any less undisputed. It's just, it's just an
2 undisputed fact.

3 THE COURT: Well, you're going to be able to argue
4 this to the jury.

5 MR. GRELL: Okay.

6 THE COURT: To argue it. I'm not going to give it to
7 them as an instruction because you have -- yeah. I was just
8 going to take that out, but otherwise, I don't think there's
9 any dispute there.

10 MR. GRELL: And that's the only thing I'd want in the
11 stipulation is to the extent I cross-examined Mr. Standish on
12 that language, that's all I want, just that.

13 THE COURT: That, that portion of the stipulation is
14 in, all right? I mean, again, because -- yes.

15 MR. CALHOUN: That's -- it was in the testimony.
16 That's the kind of stuff you said to take out so it's not
17 duplicative.

18 MR. GRELL: No, but I questioned him about it, and
19 the important thing was that it was in a stipulation, and, and
20 the thing was he hadn't reviewed it with his lawyer. Of
21 course, he wants it out. It's embarrassing for them.

22 MR. CALHOUN: It's not embarrassing.

23 THE COURT: Wait, wait, wait, wait.

24 MR. GRELL: You've tried to embarrass my client. I'm
25 talking about their client. So back atcha, buddy.

1 It has to be in the stipulation because of that.
2 It's critical that it's in the stipulation. That was the point
3 of the cross-examination with him.

4 I'm the only one who used the stipulation in trial,
5 by the way.

6 THE COURT: Yeah, that stipulation. Boy, everyone
7 should have learned a lesson on that one for future litigation.
8 All right, let's keep this going.

9 Tortious interference, justification and privilege,
10 this is the Defendants' Proposed 56. I think that's a fairly
11 fair instruction. I may not give the whole thing, but I do
12 think that that second-to-last paragraph is certainly
13 appropriate for this case, that is, that a legal advisor loses
14 the privilege if he acts solely to feather -- well, I'm not
15 sure "only" is the proper word, but if he acts solely to
16 feather his own nest, and without believing that (or caring
17 whether) he is helping his client, and he causes the client to
18 break a contract to the detriment of the other party to the
19 contract.

20 Something like that, something along these lines is
21 appropriate to this case. I think this may be too much
22 editorializing, and I want to just make sure that the
23 authorities fully support that, especially the Virginia
24 authorities, all right, because it's a Virginia cause of
25 action.

1 In terms of damages, there is a dispute between
2 you-all on that. And you would admit, Mr. Grell, all but the
3 first paragraph.

4 MR. GRELL: I am fine with everything but when he --
5 he's talking about -- their damage charges are damages, and
6 then he's got lost profits. Damage to business reputation?
7 They never alleged anything like that. They haven't submitted
8 any evidence of damage.

9 THE COURT: Yeah, that --

10 MR. GRELL: We didn't submit evidence of business
11 reputation.

12 THE COURT: Yeah.

13 MR. GRELL: I just don't see -- that's confusing
14 because there's no evidence of either lost profits or damage to
15 business reputation. The expenses, yes, because they have the
16 attorneys' fees, but I don't get where the rest of it comes in.

17 THE COURT: And there's no real evidence of profit
18 either because we don't really know how that's calculated in
19 this case. So I just --

20 MR. GRELL: Their damages are the damage chart --

21 THE COURT: Yeah.

22 MR. GRELL: -- which we can argue the elements of it,
23 but that's their damages.

24 THE COURT: I think that's correct.

25 MR. CHARNOFF: And, Your Honor, just very briefly, I

1 would again for the record want to be quite clear that it's my
2 position that they have no admissible evidence on the
3 reasonableness of those attorneys' fees, which means they can't
4 be considered at all by the jury.

5 THE COURT: Well, that's an issue we'll have to
6 decide down the road. I'm going to let this case go to the
7 jury, as I said, and we may have to clean it up afterwards.
8 We'll see what they do, all right?

9 MR. CHARNOFF: Thank you.

10 THE COURT: Okay. Yeah, I think the first paragraph
11 is all that's necessary there. And again, there's a -- okay.

12 All right. Now, punitive damages. The defendants
13 object to that. I think there's enough evidence in this case.
14 To me, the statement in one of Mr. Lohman's e-mails, "I hate
15 Navient," would be evidence potentially of malice. So, I mean,
16 again, the evidence is in the case, and I think it's not
17 unfair -- again, it has to be individual -- as to each
18 individual. The GST defendants don't have any direct
19 connection with Navient in that respect so --

20 MR. CHARNOFF: Correct, Your Honor. The evidence by
21 every single witness and all the documents is there's no
22 relationship, they didn't even know who Navient was. How on
23 earth could there ever be the intent?

24 And the punitive damages, I've lectured on this a
25 couple times. Punitive damages, you have to have -- it's the

1 highest -- it's the highest burden under Virginia law. Again,
2 we're talking about state law now.

3 THE COURT: You know, I'm inclined because of the
4 nature -- first of all, because RICO is in this case and RICO
5 already exposes the defendants to triple damages.

6 MR. CHARNOFF: Correct.

7 THE COURT: All right? In addition, it exposes --
8 any of these claims expose Mr. Lohman to bar problems if he's
9 found to have committed fraud. So I don't know why we need to
10 have punitive damages in this case.

11 MR. GRELL: And if they get -- if they win this case
12 under RICO --

13 THE COURT: Yeah.

14 MR. GRELL: -- they're not going to get -- they can
15 have a judgment of \$100 billion.

16 They're not -- Mr. Lohman only has so much money.

17 THE COURT: All right.

18 MR. GRELL: You say we're getting paid. I hope we
19 get paid.

20 THE COURT: All right. So I really in this case
21 don't think punitive damages are necessary or appropriate.

22 MR. CALHOUN: I hear Your Honor. For the record, we
23 think there is evidence of malice, and there is evidence of
24 reckless disregard. It should go to the jury.

25 THE COURT: I mean, if you, if you get -- if you get

1 to RICO, you've got punitives.

2 MR. CALHOUN: We understand.

3 THE COURT: All right? So I'm going to knock that
4 one out, which will shorten, I think, the verdict form a little
5 bit, too. So 59 also would come out then.

6 Okay. You both wanted 60. I'll let it in. I think
7 the one thing the jury probably knows at this point if nothing
8 else, they probably already know that, but we'll leave it in.

9 But I don't know if we need -- I mean, again, I don't
10 like to use jury instructions as a primer on the law, and
11 actually, let me rethink that. Why do we need any of these
12 right now? I mean, I don't want to start getting into the
13 definition of "ATDS." I don't think it's appropriate at this
14 point, certainly not in an instruction.

15 MR. GRELL: I'm fine with that, Your Honor.

16 MR. CALHOUN: And we only wanted this because of the
17 motion in limine. In particular, we're, you know, they were
18 supposed to have argued only that --

19 THE COURT: Okay.

20 MR. CALHOUN: -- their view was that we had violated
21 TCPA, but their arguments and the testimony that they elicited,
22 they argued repeatedly that we actually violated TCPA, which is
23 completely inconsistent with Your Honor's ruling on the motion
24 in limine.

25 THE COURT: Well, that's a subtle point. I mean --

1 but I don't think we need to get these in jury instructions. I
2 mean, the jury has heard what the theory of the case was.

3 MR. CALHOUN: Certainly maybe a cautionary
4 instruction, something like that, might be appropriate.

5 MR. GRELL: And, Your Honor, I was very, very careful
6 about this issue. I always couched it as -- I defined
7 "robocall" in my opening statement, which -- and I think the
8 only time it was, it was -- there was somebody stepped across
9 the line was maybe when Mr. Muhtaseb said something like we
10 sued them because they violate the TCPA, but I think he was
11 talking in the context of when we were -- the time they were
12 bringing these, these claims.

13 THE COURT: Okay.

14 MR. GRELL: And I tried to abide by the limitations
15 that were -- I'm much better than these guys. Three times they
16 tried to get *Facebook* in.

17 MR. CALHOUN: Your Honor, I just -- I won't belabor
18 it.

19 THE COURT: All right. My point is I don't think we
20 need 60 or 61, all right?

21 MR. GRELL: I agree.

22 THE COURT: All right. Mr. Charnoff, do you have any
23 objection to that?

24 MR. CHARNOFF: I have no objection to giving the jury
25 less instructions than more.

1 THE COURT: I agree with you on that. Okay. So
2 those are out.

3 MR. URBAN: Was that 60 and 61?

4 THE COURT: Yes, 60 and 61.

5 All right. Now, 62 is the *Noerr-Pennington* immunity
6 issue, and as I said, I really don't want to scare the jury
7 with any more legalese than they have to have.

8 MR. CALHOUN: Your Honor, if we took out the term
9 "*Noerr-Pennington*" and just said that --

10 MR. GRELL: No, our instruction is First Amendment.

11 MR. CALHOUN: Yeah, I think what you have to do here,
12 Your Honor, based on that, is merging these.

13 THE COURT: I agree. I think something -- I'm going
14 to look at the two of them and put one together that covers
15 this issue, but let me just --

16 MR. GRELL: And I would say he -- he cites *Waugh* for
17 this idea that you've got to look at the whole, not just
18 individual success, when you're dealing with mass whatever
19 litigation is. I don't disagree with that concept, but our
20 instruction includes that, but really the way that they're --
21 they've set up their damage claim is that a jury could go
22 through and say, okay, on this one, it was sham; this one it
23 was not sham; this one it was sham; this one it was not sham.
24 And they could literally strike rows out of their damage
25 calculations.

1 And so I, I think it's okay to instruct them on
2 *Waugh*, but I think the problem with the plaintiff's instruction
3 is that it overwhelms the whole instruction otherwise and --
4 given the way they pled it.

5 And two, *A Fisherman's Friend* says that successful
6 litigation is not a sham, and I'm not -- that is the case I've
7 relied upon since Day One, and they don't even cite to it.
8 They act like I'm citing some other case. It's *A Fisherman's*
9 *Friend* that I've relied upon, because I remember that name
10 because it's a silly name.

11 THE COURT: *A Fisherman's Best*, I think it is.

12 MR. GRELL: Yeah.

13 MR. CALHOUN: Your Honor, *Waugh* is the standard. It
14 sets forth the standard in this circuit. It expressly rejects
15 in this situation the *PRE* test that they put in that
16 instruction. I think it would be error to include it even if
17 they'd liked to do it line by line. The jury can do whatever
18 the jury wants to do, and they can do that under *Waugh*.

19 THE COURT: All right. Well, I'm going to look at
20 that, but some, some careful instruction on that does have to
21 be in here. I mean, we have it to some degree already in that
22 earlier instruction.

23 MR. GRELL: What's that?

24 THE COURT: The protection of legal activity is
25 already --

1 MR. GRELL: Yeah, we've already got that. I think we
2 can -- I'll look forward to your merger.

3 THE COURT: All right. And it may all go wind up in
4 one instruction. I want to see whether it's more elegant just
5 to have it in one because I'll save a few trees in the course
6 of having --

7 MR. GRELL: There's a lot of overlap between those
8 two issues.

9 THE COURT: Okay. Now, accord and satisfaction,
10 that's another issue that really has not been significantly
11 discussed in the case by the defendants, and I don't want to
12 pop issues in the instructions that doesn't match up with
13 what's been argued or evidenced in the case.

14 MR. GRELL: Your Honor, I think in my opening
15 statement, I did argue that they signed settlements. And all
16 of the settlement agreements, by the way, are in evidence.
17 They came in without objection.

18 I think it's -- I did not discuss it during the
19 opening because I tend to focus on what their burden of proof
20 is, and I wanted to keep the opening short.

21 THE COURT: Okay.

22 MR. GRELL: But I will connect this in my closing,
23 and I think I have a right to do that because the evidence is
24 all in the record.

25 THE COURT: Well, as I understand it, you've all

1 agreed to everything except the plaintiff just wants that one
2 sentence taken out at the end of paragraph 1. Do I read how
3 you submitted this --

4 MR. GRELL: Yeah. I mean, it's -- it's the whole
5 satisfaction.

6 THE COURT: Or was your proposal just that one
7 sentence and everything else would -- you-all agree on the
8 first long sentence.

9 MR. CALHOUN: It's just the one sentence that we want
10 in that they want in. We think it should include --

11 THE COURT: You want that "In order for the
12 defendants to prevail on this defense, they must show that the
13 parties specifically agreed to the defendants' release with
14 respect to an existing obligation."

15 MR. CALHOUN: Correct, Your Honor.

16 THE COURT: You want that in.

17 MR. CALHOUN: Correct.

18 THE COURT: And the defense would omit that.

19 MR. GRELL: We think the requirement that there be a
20 full satisfaction is expressed clearly, etc., that addresses
21 that issue that they're trying to get to adequately. I think
22 it's repetitive, the question -- the sentence they want.

23 MR. CALHOUN: It's not because, Your Honor -- accord
24 and satisfaction requires a specific agreement.

25 THE COURT: Yeah. "Accord is a satisfaction agreed

1 upon between the party injuring and the party injured, which,
2 when performed, is a bar to all actions upon the claim." I
3 mean, the words "agreed upon" mean just that.

4 So again, the next paragraph, the language "the
5 accord is the agreement between the parties," so I think that
6 that extra sentence is redundant. I mean, I think it's more
7 than adequately expressed there.

8 And then, "To be valid, the agreement must be offered
9 and accepted and there must be an exchange of consideration."
10 The jury doesn't know what "consideration" is, but, I mean --
11 okay. So all of this, the only thing that was in dispute was
12 that one sentence.

13 MR. GRELL: Yes.

14 THE COURT: I'm going to omit the sentence because I
15 think it's more than adequately covered in the rest of the
16 language there.

17 And then collateral estoppel, another legal term
18 which is going to send shivers --

19 MR. GRELL: Well, we could use issue preclusion. The
20 title doesn't matter to me.

21 THE COURT: How about just a party cannot, you know,
22 a party cannot relitigate issues that were decided in a prior
23 proceeding?

24 MR. GRELL: Sure.

25 THE COURT: All right? Rather than -- all right. A

1 party cannot relitigate issues that were decided in a prior
2 proceeding in which it was involved.

3 MR. CALHOUN: Your Honor, we'll just reserve the
4 right to take a look at it.

5 THE COURT: Sure. That's why we're going to get them
6 to you ahead of time.

7 MR. GRELL: I think that's it.

8 THE COURT: Do we need anything more than that? I
9 mean, in other words, do we need the 1, 2, 3, and 4 there?

10 MR. GRELL: Where are you looking at?

11 THE COURT: I'm still looking at 64. I mean,
12 certainly there's nothing inaccurate about that statement, but
13 it's just more things for the jury to start thinking about.

14 MR. CALHOUN: That's the reason why I made the
15 reservation, Your Honor. I think your sentence is so broad, it
16 could take collateral estoppel for more than it is, but --

17 MR. GRELL: Well, the one nuance is that it is
18 defensive collateral estoppel, you know, and if you do research
19 on the, on the standard, that's why I'm using a federal claims
20 court case.

21 MR. CALHOUN: And there's a bunch of wrinkles here
22 because it's different parties.

23 MR. GRELL: It's not different. You guys, you guys
24 were a party to those claims, and they were decided against
25 you --

1 THE COURT: All right. Well, I'm going to leave it
2 in without the fancy terminology, and hopefully that will not
3 confuse things too much.

4 MR. GRELL: Okay. Thank you.

5 THE COURT: Okay. And you agreed on waiver, and you
6 agreed on the duty to mitigate, and you agreed on rendering a
7 verdict. So I think all the rest of it you agreed on, right?

8 Is there anything else we didn't cover? Am I missing
9 any? I don't think so. That's page 105.

10 (No response.)

11 THE COURT: All right. So for the record, since we
12 want to finish up things, now, the other thing is I don't know
13 whether you need all these exhibits in here. I mean, at this
14 point, if you don't have your assistants or whoever brought
15 these over in the first place, why don't you arrange Monday to
16 get them out of here, all right? Maybe once -- how long does
17 it take for you to box these up and get them out?

18 MR. CHARNOFF: It takes a good 20 minutes, Judge.

19 THE COURT: Okay.

20 MR. CHARNOFF: So if -- depending on what time you
21 actually want to speak with us, I know you said 9:30, then you
22 said maybe 8:45. I didn't know if that was --

23 THE COURT: Maybe I'll compromise it, nine o'clock.
24 I think we did pretty well this afternoon. I don't really see
25 a huge amount of dispute going on here.

1 MR. CHARNOFF: And so then, Your Honor, so if you
2 anticipate between, you know, nine and however long it takes us
3 to resolve final issues, then we could have assistants come in
4 before ten and take the boxes out or just --

5 THE COURT: No.

6 MR. CHARNOFF: I just want to make sure we have
7 enough time to do it.

8 THE COURT: Yeah, I think the better thing would
9 be --

10 MR. CALHOUN: I think it would be better to do it
11 after, Your Honor.

12 THE COURT: After. We'll just keep the courtroom
13 ugly for a while. So -- but plan to have your people here,
14 okay, so that we can clean up the courtroom.

15 All right. So what I'm waiting on you-all for, back
16 to me, will be the stipulation. Hopefully there can be an
17 agreement. You're going to get from me at some point -- and it
18 actually may even be tomorrow morning; we'll try to get it to
19 you tonight; but I can't guarantee you that we'll have it
20 finished -- the proposed new verdict form and a clean copy of
21 the instructions, okay?

22 And as I said, the order may be a little bit
23 different from what we just did, because I think a couple
24 things may be out of order, and if you see anything -- first of
25 all, it still gives you a chance if there are some additional

1 instructions, I'm not looking for them, but if you think that
2 there is something you left out, get it to opposing sides, and
3 get us a copy right away, and if there's any corrections or
4 changes you want made to what I send you, then get it to us no
5 later than 7:30 Monday morning, and I'll make sure that Gillian
6 gives you the e-mail that you'll send it to, because the court,
7 you know, is closed. And then we'll have a chance to fine-tune
8 things.

9 So I think nine o'clock should be fine Monday. I'm
10 hoping we don't have too much argument, all right?

11 So we know what time for the arguments. And the last
12 thing is file any final motions just for the record.

13 MR. CALHOUN: Yes, Your Honor. I mean, I understand
14 you're sending it to the jury, but for the record, we would
15 make a Rule 50 motion for a verdict.

16 THE COURT: All right. It's denied. I don't need to
17 hear argument on that.

18 MR. GRELL: And for the record, we will also reassert
19 our Rule 50 as well.

20 THE COURT: All right. And that is denied.

21 MR. URBAN: And I just wanted to clarify that not
22 only are we renewing what we had already argued, but the
23 reasonableness of attorneys' fees, because what I had said
24 before was we were waiving it at that juncture.

25 THE COURT: I understand that.

1 MR. URBAN: And we are reasserting it now.

2 THE COURT: All right.

3 MR. URBAN: One last thing, Your Honor?

4 THE COURT: Yeah.

5 MR. URBAN: Three times plaintiffs have tried to get
6 in *Facebook*. Now, I talked to them after the first time they
7 did it, and they said, well, you opened the door.

8 Look, if they want to argue to you that we opened the
9 door, we need to have that argument and not them try to just
10 slip it in. So I hope that they're not going to try to do that
11 in the closing somehow.

12 THE COURT: All right. I really think, we all know
13 it's terribly bad form to object during a closing argument, so
14 all sides have to be careful to make sure that what is argued
15 is within the parameters of the evidence that came in during
16 the trial and any, you know, rulings, and your understanding of
17 what the instructions are going to be, but you're all very good
18 professionals. I really don't expect that to happen, all
19 right? But that's all I can say on that one.

20 I mean, again, I've told the jury this, and I'll
21 write out a small instruction and just make it crystal clear to
22 them, you know, the law as to whether or not the system that
23 plaintiff was using at the time was unsettled. That is clearly
24 the situation, and the proof of that is that judges and
25 arbitrators were going all over the place, and it took the

1 Supreme Court to address one of these issues.

2 It's a very complicated statute, all right?

3 MR. CHARNOFF: And, Your Honor, that is one of the
4 stipulations that goes back to summary judgment from --

5 THE COURT: I understand that. So there shouldn't be
6 any problem with that, all right? Okay.

7 Yes, sir.

8 MR. CHARNOFF: Your Honor, very briefly, GST, Greg
9 Trimarche, and Rick Graff, we respectfully and humbly reassert
10 our Rule 50 motion, that there is literally no evidence on
11 multiple elements of the two RICO counts against them and with
12 respect to the tortious interference count, where they
13 literally didn't know who Navient was, never formed any
14 agreements to harm them. There's -- every witness said that.

15 There's literally no evidence that the jury could
16 possibly render a verdict against my clients on those issues.
17 And so I respectfully resubmit our Rule 50 motion.

18 THE COURT: Mr. Calhoun, address that last issue for
19 the GST defendants in terms of tortious interference of
20 contract.

21 MR. CALHOUN: Their not knowing who Navient was?

22 THE COURT: Yeah.

23 MR. CALHOUN: Your Honor, it's really pretty simple.
24 If you and all the court staff were sitting in a room having a
25 chat and I throw a rock into the room and I don't care who I

1 hit and I hit you, it doesn't matter that I didn't intend to
2 hit you. I intended to throw a rock into the room.

3 Here GST created a system, a program to generate
4 deals, as they were called in the parlance, whereby they would
5 recruit borrowers and send them to attorneys who didn't know
6 what they were doing. Mr. Trimarche testified he had no idea
7 how these contracts would be resolved, but he reviewed and
8 approved the scripts that were subtly and not so subtly telling
9 borrowers that they can't participate in the program or they
10 give up their leverage if they're paying their debts.

11 They knew that they were encouraging borrowers into
12 this program. They were going to take 40 percent of the
13 balance from them. They knew that they were going to encourage
14 them to default. That's pretty clear from the evidence.

15 So the fact that when they started it, they didn't
16 know that it would turn out that most of the loans would be
17 Navient doesn't matter. They knew they were interfering in
18 these contracts. They just didn't know who the name was on the
19 contract.

20 THE COURT: But your -- all of the losses that are at
21 issue in this case are not as a result of debtors defaulting.

22 MR. CALHOUN: I disagree with that, Your Honor.

23 THE COURT: It's that the debtors defaulted and
24 brought TCPA claims against you.

25 None of your -- none of your losses in this case are

1 related to a simple default. Every one of them has to do with
2 a suit, an arbitration, or a lawsuit that was filed against
3 Navient for a TCPA violation.

4 MR. CALHOUN: That -- well, for an alleged TCPA
5 violation, I'll give you.

6 THE COURT: All right.

7 MR. CALHOUN: Your Honor, in our view, it's -- it was
8 all because this whole program was a pipeline to litigation. I
9 mean, that's what the program that Gregory Trimarche wrote
10 about was. We're going to assist your -- you with your debt by
11 finding violations -- they just called it violations -- of
12 federal law.

13 The very thing that they envisioned and that they
14 sold was the creation of a lawsuit, and so you can't separate
15 one from the other in our view.

16 THE COURT: Well, we'll have to -- again, I'm going
17 to wait and see what the jury does in this case, all right?
18 And I'm prepared for an avalanche of post-verdict, possibly
19 not. The jury may not be able to reach a decision, whether the
20 eight of them can agree on this. It's a complicated case the
21 way it's been, you know, structured, and these are not lawyers.
22 They've paid careful attention, but it will be interesting to
23 get what eight ordinary citizens think about the issues in this
24 case.

25 We'll have to see. We're going to let it go like

1 that, all right? I have certain concerns myself, but I'm going
2 to wait and see what they do.

3 Yes?

4 MR. URBAN: I just wanted a clarification of the
5 comment you just made. You said the eight jurors. Are you
6 going to have all eight --

7 THE COURT: Oh, yeah. I thought I made that clear.
8 I mean, the federal rules say six to twelve.

9 MR. URBAN: Okay.

10 THE COURT: All right? And my practice in all civil
11 cases, unless it's an incredibly long one, is eight jurors. In
12 case one or two had to drop out for some reason --

13 MR. URBAN: You get to the six.

14 THE COURT: -- we'll still have our minimum six, but
15 I thought I had made that clear when I --

16 MR. URBAN: No, I guess I misunderstood.

17 THE COURT: There are no alternates. This is the
18 eight who are going to decide the case, all right?

19 MR. URBAN: Thank you for that clarification, Your
20 Honor.

21 THE COURT: Okay. All right. So I'm going to let
22 you-all go home, and we'll try to get some answers to you as
23 quickly as we can.

24 MR. CHARNOFF: Your Honor, just for clarity on the
25 record --

1 THE COURT: Yeah.

2 MR. CHARNOFF: -- you're formally at this time
3 denying the GST --

4 THE COURT: I'm sorry.

5 MR. CHARNOFF: -- Greg Trimarche, and Rick Graff
6 renewed motion Rule 50?

7 THE COURT: Yes. I'm denying the motions. The case
8 is going to go to the jury. You get to argue the case one more
9 time.

10 You-all take it easy over the weekend. Mr. Grell, I
11 hope you get your voice back because I want to be able to hear
12 you.

13 MR. GRELL: I do, too.

14 THE COURT: All right? The only other thing is if
15 anyone's going to use demonstratives, make sure you've cleared
16 them with the other side in advance. They have to be big
17 enough, it doesn't make any sense to use them if the jury can't
18 see them. You may, you may also use, you know, exhibits on the
19 screen, but they eat up time, so be careful if you're going to
20 do that.

21 MR. URBAN: Could we get a deadline for that? Just
22 because I've been getting e-mails at 5:50 in the morning, and
23 I'm not up at 5:50 in the morning.

24 THE COURT: You're not?

25 MR. URBAN: No, ma'am. I'm, I'm a little on the

1 older side.

2 THE COURT: Okay. I think --

3 MR. URBAN: Sunday, five o'clock, if we could?

4 MR. CALHOUN: I'm fine with that.

5 THE COURT: I was going to -- I was going to say
6 Sunday by noon.

7 MR. URBAN: All right. Sunday by noon would be --

8 THE COURT: Come on, you've got to have some break
9 because you-all come in cranky Monday if you're working too
10 late, all right? I might be cranky, which is even worse by the
11 way.

12 Okay. That's it for today. We'll get stuff to you
13 as soon as we can. All right, we'll recess court.

14 (Recess from 4:16 p.m., until 9:00 a.m., August 16, 2021.)

15

16 CERTIFICATE OF THE REPORTER

17 I certify that the foregoing is a correct transcript of
18 the record of proceedings in the above-entitled matter.

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21

/s/

Anneliese J. Thomson

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